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**CASES DETERMINED**  
**BY THE**  
**ST. LOUIS, KANSAS CITY AND SPRINGFIELD**  
**COURTS OF APPEALS**  
**OF THE**  
**STATE OF MISSOURI**

---

**REPORTED FOR THE**  
**ST. LOUIS COURT OF APPEALS**  
December 8, 1914, to January 5, 1915  
**BY THOMAS E. FRANCIS** of the St. Louis Bar.

**FOR THE**  
**KANSAS CITY COURT OF APPEALS**  
September 21, 1914, to January 11, 1915  
**BY JOHN M. CLEARY** of the Kansas City Bar.

**AND FOR THE**  
**SPRINGFIELD COURT OF APPEALS**  
December 12, 1914, to December 31, 1914  
**BY MORRISON PRITCHETT** of the Webb City Bar.

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JUN 28 1915

JUDGES OF THE  
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HON. ALBERT D. NORTON, }  
HON. WILLIAM H. ALLEN, } *Judges.*

JOSEPH FLORY, *Clerk.*

THOMAS E. FRANCIS, *Reporter.*

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JUDGES OF THE  
KANSAS CITY COURT OF APPEALS.

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CASES DETERMINED  
BY THE  
ST. LOUIS, KANSAS CITY AND SPRINGFIELD  
COURTS OF APPEALS  
AT THE

OCTOBER TERM, 1914.

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*(Continued from Volume 185.)*

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JOHN B. OWEN, Appellant, v. HERBERT S  
HADLEY et al., Respondents.

St. Louis Court of Appeals, December 8, 1914.

1. **WORK AND LABOR: Services Performed for Political Committee: Compensation: Implied Contract.** In an action against the members of a political committee, the contestees in an election contest and certain other members of the party, for services rendered for the committee preliminary to the contest, where it did not appear that plaintiff intended, at the time the services were rendered, to charge therefor, and the character of the services and the circumstances under which they were rendered were such as to lead defendants to believe that plaintiff was merely giving his assistance as a matter of party service without expectation or hope of compensation, *held* that plaintiff was not entitled to recover.
2. **PRINCIPAL AND AGENT: Services Performed for Political Committee: Authority of Agent.** Where the chairman of the State committee of a political party retained an attorney to act



in impending election contest proceedings, without authority from the committee, and the attorney employed plaintiff to render services in the contest, the individual members of the committee were not liable for plaintiff's services.

3. ———: ———: ———. Where the chairman of the State committee of a political party, without authority from the committee or the contestees, retained an attorney to act in impending election contest proceedings, and the attorney employed plaintiff to render certain services in connection with such contest, without undertaking to bind any one else, limiting his own responsibility to a certain amount per week, such contract bound no one but the attorney who made it.
4. **WORK AND LABOR: Services Performed for Political Committee: Compensation: Implied Contract.** In an action against the members of a political committee, the contestees in an election contest and certain other members of the party, for services rendered in connection with the contest, where it was shown that the chairman of the committee retained an attorney to act in the contest and the latter employed plaintiff, without undertaking to bind the chairman or the other parties defendant, *held* that the chairman and the other members of the party who were sued were not liable on the theory that one becomes personally liable, who, without authority, assumes to act for another and procures the rendition of valuable services for him, since neither of such defendants procured the rendition of the services for which plaintiff sued.
5. ———: **Express Contract: Right to Recover on Quantum Meruit.** Where an existing express contract has been fully performed by plaintiff, and nothing remains to be done except payment by defendant, plaintiff need not declare on the express contract, but may proceed on a *quantum meruit* to recover the reasonable value of the services, but, in such event, the recovery is limited to the reasonable value of the services, not exceeding the contract price.
6. ———: ———: ———: **Evidence.** In an action on a *quantum meruit* for services rendered under an express contract, the contract is admissible in evidence, and the rights of the parties are to be determined in accordance therewith.
7. ———: **Implied Contract: Credit Given Third Person.** One who is benefited by work performed is not liable therefor if credit is given solely to another at whose request the work is performed.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

*S. P. Bond* for appellant.

(1) The court erred in refusing to submit plaintiff's right of recovery as in *quantum meruit*. The petition is merely one of an account. Such being true, it was competent for plaintiff to recover in *quantum meruit* for reasonable value as well as on a special contract, if the evidence revealed one. *Swift v. Johnson*, 158 S. W. 96; *Johnson v. Loomis & Snively*, 50 Mo. App. 142; *Columbia Bank v. Patterson*, 7 Crouch, 299; *Londregon v. Crawley*, 12 Conn. 561; *Holmes v. Stummel*, 24 Ill. 370. (2) The court erred in sustaining the demurrer to the evidence as to the defendants and contestees, John C. Brown, John Kennish, Wm. P. Evans and Frank A. Wightman. Where services are performed by one for another, either with or without the latter's consent and knowledge, and he knowingly accepts and avails himself of these services, the general rule is that the law will imply a promise to pay a fair and reasonable compensation therefor. Plaintiff may either sue for breach of contract and recover damages, or he may abandon the contract and recover on the *quantum meruit*. *Franklin Motor Car Co. v. Kast*, 157 S. W. 84; *Hiemenz v. Goerger*, 51 Mo. App. 586; *Painter v. Ritchey*, 43 Mo. App. 111; *Holmes v. Board of Trade*, 81 Mo. 137; *Thomas v. Walnut Land etc., Co.*, 43 Mo. App. 653; *Wagner v. Edison Electric Ill.*, 177 Mo., 44; *O'Brien v. Boiler Co.*, 154 Mo. App. 183; *Wagner v. Illuminating Co.*, 141 Mo. App. 51; *Allen v. Richmond College*, 41 Mo. 302; *Stone v. Union Trust Co.*, 150 Mo. App. 331. (3) The court erred in sustaining the demurrer to the evidence as to each of the defendants, Governor Hadley, Mr. Morris and Judge Spencer. Where one procures services to be rendered for the benefit of a third person, without authority from or subsequent ratification by the

latter, he will be liable to the party performing the services for their reasonable value. *Ludlum v. Couch*, 10 N. Y. App. Div. 603. He will be liable if it be shown that the work, though done for another, was performed at his request and on his credit. *Clark v. Roop*, 15 Ark. 172; *Scott v. Messick*, 4 T. B. Mon. 535. (4) If the contract has been completely executed, the plaintiff may recover as on an implied contract, under an *indebitatus assumpsit*, the price of his services, but the contract must regulate the amount of his recovery. *Columbia Bank v. Patterson*, 7 Crouch 299; *Londregon v. Crawley*, 12 Conn. 561; *Holmes v. Stummel*, 24 Ill. 370; *Swift v. Johnson*, 158 S. W. 96. (5) Where services are rendered under a mutual mistake of the parties as to the price to be paid therefor, the law rejects the understanding of each party and awards what the services are reasonably worth. The same rule obtains where an agent is employed to contract for work, and in good faith and with reasonable care and diligence makes the contract, although such reasonable compensation exceeds the sum which the agent was authorized to promise. *Turner v. Webster*, 24 Kan. 38, 40, 41; *Dwight v. Johnson*, 158 S. W. 96. (6) The court erred in sustaining the demurrer to the evidence as to the defendant Chas. D. Morris. If one performs services for another through mistake of fact through the fraud or concealment of another to render valuable services for the latter, he will be permitted to recover the reasonable value of the services, regardless of any original intention to charge therefor. *Boardman v. Ward*, 40 Minn. 399; *Hickam v. Hickam*, 46 Mo. App. 497; *Higgins v. Breen*, 9 Mo. 497; *Rickard v. Stanton*, 16 Wend. 20; *Robbins v. Potter*, 11 Allen 588.

*Spencer & Donnell, Lon O. Hocker and Wm. Zachritz* for respondents.

(1) The services which Mr. Owen claims to have rendered in the first two items of his bill were, accord-

ing to his own testimony, before he was engaged to do any work and, according to his admission, entirely gratuitous. (2) In any event, whatever Mr. Owen's services may have been worth, he cannot recover on a *quantum meruit* more than the agreed amount for which he was to render them. *Kick v. Doerste*, 45 Mo. App. 139; 3 Elliott on Contracts, sec. 2150. (3) Services which may have been for the benefit of a third party do not create any liability upon such third party for payment, unless the employment was authorized by said third party, or unless the circumstances were such as to create an implied promise on the part of said third party to pay. This implied promise can never be presumed when the services are rendered under a distinct agreement with others both as to the method of payment and amount of compensation entirely independent of such third party.

ALLEN, J.—Plaintiff's action is against thirty-nine defendants, and proceeds as in *indebitatus assumpsit* for the recovery of \$1246.66, the balance claimed to be due for services rendered in connection with certain election contests. Plaintiff suffered a nonsuit below, and, after unsuccessfully moving to have the same set aside, appealed to this court.

The services in question were rendered by plaintiff in and concerning the election contests which were commenced in the Supreme Court of this State on or about December 17, 1910, involving the offices of Judge of the Supreme Court, Superintendent of Public Schools, and Railroad and Warehouse Commissioner. In November, 1910, almost immediately following the general election of that year, it appeared that contest proceedings would probably be instituted by the defeated (Democratic) candidates for the offices above mentioned. Plaintiff, a resident of the city of St. Louis, had for many years been an active political worker in the Republican Party, had had much experience in po-

litical affairs, and had rendered services in connection with other election contests. Shortly after the general election in 1910, it appears that an informal meeting or conference was held at the Jefferson Hotel, in the city of St. Louis, at which were present the following defendants, viz.: Hon. Herbert S. Hadley, then governor of the State, Judge John Kennish, Judge John C. Brown, Prof. Wm. P. Evans, and Mr. Frank A. Wightman, who were the contestees in the contest proceedings afterwards instituted, and Mr. Chas. D. Morris, then Chairman of the Republican State Committee. It seems that at this meeting the proposed contests were discussed, and plans for raising money therefor were considered. Following the conference, Mr. Morris, assuming to act for the State Committee, but without having been authorized by the Committee so to do, employed Ex-Judge Selden P. Spencer, one of the defendants, and Lon O. Hocker, Esq., as counsel in connection with the contemplated contests.

Plaintiff testified that just prior to the day upon which the canvassing of the election returns was to begin, Mr. Morris sent for him, and that he, in company with Mr. Morris, went to Jefferson City, where he conferred with Gov. Hadley, and for three days was present at the office of the Secretary of State, in connection with the canvassing of the returns, to "keep track of the returns and look for any irregularities that might happen that would be detrimental to the Republican Party." Plaintiff stated that he then returned to the city of St. Louis, and later, in response to a telephone call from Judge Kennish, which, he says, he answered in Judge Spencer's office, in the latter's absence, he, Judge Spencer and Mr. Hocker went to Jefferson City; that as the result of conferences at Jefferson City he went to certain other points in the State, and then reported to Gov. Hadley, who directed him to report to Judge Spencer at St. Louis; and that on December 6, 1910, he reported to Judge Spencer, when

an oral agreement was made with the latter regarding plaintiff's employment, and his compensation. Plaintiff says that he told Judge Spencer that his services were worth \$100 per week; but that Judge Spencer said: "You are worth \$100 a week, but, unfortunately, the State Committee has placed in my hands a very small sum of money, so small that I will not be personally responsible for more than \$50 a week to you." And that he (plaintiff) then said that he would accept \$50 per week "on account" with the understanding that he was to have the additional \$50 per week "when ever the State Committee was in funds."

When asked by Judge Spencer, on cross-examination, to state again his understanding of this conversation plaintiff said: "That I was to receive \$100 a week. You said that I was worth a \$100 and that you would gladly pay it if you had it, but you said, unfortunately, the State Committee had placed in your hands a very small sum of money and that you could not consistently guarantee to pay more than \$50 on account, with the understanding and agreement that I was to have the additional \$50 when the State Committee was in funds." Q. "Was there anything said about my guarantee or responsibility in the matter?" A. "\$50 a week." Q. "That the limit would be \$50 a week?" A. "That was all you would guarantee at the time."

Plaintiff proceeded with the work and was engaged therein from December 6, 1910, the date of the agreement above mentioned, to May 13, 1911, during which time he was paid \$50 per week. In his account, contained in the petition, he claims \$100 for services rendered prior to December 6, 1911, and \$50 per week additional thereafter to May 13, 1911, making a total of \$1241.66.

The suit proceeds against Gov. Hadley, Judge Spencer, the four above mentioned contestees, Mr. Morris and all of the other members of the State Committee.

It is conceded here that no case was made against any of the individual members of the State Committee other than Mr. Morris, its Chairman. It is contended, however, that the court erred in sustaining the demurrer to the evidence as to Gov. Hadley, Judge Spencer, Mr. Morris and the four contestees.

As to the services rendered prior to December 6, 1910, the date of the agreement with Judge Spencer, no express agreement appears on the part of anyone to compensate plaintiff therefor. Nor do we think that the law will imply any such promise from all of the facts and circumstances shown in evidence. It does not appear that plaintiff intended at the time to charge therefor, but the inference is irresistible that such was not the case. And if plaintiff harbored any such secret intention, the character of the services and the circumstances under which they were rendered, were such as to lead reasonable men, in the position of the other parties immediately concerned, to believe that they were rendered gratuitously; that plaintiff was assisting in this preliminary work as a matter of party service, without expectation or hope of immediate reward, as were other active members of his political party. His expenses were paid at the time, and there is no evidence of any word or act on his part indicating that he expected compensation; on the other hand Gov. Hadley, called by plaintiff as a witness, testified that plaintiff said that he was rendering such services without charge. And it seems quite clear that those defendants with whom plaintiff was associated in such work had no reason to believe that they would be expected to compensate plaintiff therefor. We have no hesitation in saying that there could be no recovery upon these items of the account. [See *Wagner v. Illuminating Co.*, 141 Mo. App. 1. c. 72, 73, 121 S. W. 329.]

The services rendered after December 6, 1910, were rendered under the agreement made by plaintiff with Judge Spencer. This, as plaintiff himself

says, was the only agreement had respecting his compensation. At the trial below it was admitted by defendants that Judge Spencer was acting at the time for the State Committee. The evidence is that he was retained by Mr. Morris, the Chairman of the Committee, without any authority therefor at any time given by the Committee itself. It is clear that this could not bind the individual members of the Committee; and such is conceded. Nor does it appear that this agreement could be binding upon any of the other defendants.

The evidence is that Mr. Morris, acting upon his own initiative, employed Judge Spencer and Mr. Hocker as counsel, and provided certain funds to defray the necessary expenses incident to the contests, thereby relieving the contestees of the burden of employing counsel and defending the title to their respective offices in these proceedings. In so doing it is to be inferred that Mr. Morris was acting under a sense of responsibility which he felt as Chairman of the State Committee, believing that his political party, through him as the head of its State organization, should assume this burden. He did not, however, contract directly with plaintiff, but this was left to Judge Spencer, one of the counsel employed in the matter. The latter's agreement did not undertake or purport to bind Mr. Morris personally, nor did Judge Spencer have any authority so to do. Neither did it purport to bind Gov. Hadley or any of the contestees; nor could it, in the absence of authority therefor. It quite clearly appears that Judge Spencer limited his own responsibility to \$50 per week, which was paid; and that no further liability could attach to him in the premises. If Gov. Hadley and Mr. Morris are liable, such liability cannot grow out of the agreement made by Judge Spencer, but must arise from the acts of these defendants themselves in the premises.



It is contended that Gov. Hadley and Mr. Morris are liable, upon the theory that they procured the services to be rendered for the benefit of others without authority from the latter, whereby they became liable to plaintiff for the reasonable value of such services. We have no fault to find with the general proposition of law asserted in this connection, viz., that one will become personally liable, who, without authority, assumes to act for another, and procures the rendition of valuable services for the benefit of such other person. But the facts here are such, we think, as to leave no room for the application of this principle. Nothing appears which could bind either of these defendants personally as for having procured the rendition of the services by plaintiff without authority from those to be benefited thereby, or otherwise. All that is shown as to Gov. Hadley's connection with the ultimate employment of plaintiff for this work is that he told plaintiff, as the latter says, to report to Judge Spencer with whom plaintiff made his agreement. And, Mr. Morris appears to have left the matter of employing plaintiff entirely in Judge Spencer's hands, and to have done nothing whereby to bind himself personally in the premises. And the evidence is that while the services were being rendered Mr. Morris took charge of making the weekly payments to plaintiff and learned that plaintiff was claiming \$100 per week, whereupon he told plaintiff that he would pay but \$50 per week. We see nothing in the evidence to fasten personal liability upon either of these two defendants.

A further contention is that plaintiff is entitled to recover upon *quantum meruit* against the four above-mentioned contestees, upon the theory that where services are performed for one, either with or without his knowledge and consent, and he knowingly accepts and avails himself of such services, the law will imply a promise to pay a fair and reasonable compensation therefor. Again there is no fault to be found

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Owen v. Hadley.

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with this as a broad general statement of the law; but appellant's contention in this regard omits to properly reckon with the special agreement made in the premises and under which the services were rendered. It is quite true that where an existing express contract has been fully performed by the plaintiff, and nothing remains to be done except the payment by defendant for the services rendered thereunder, plaintiff need not declare on the express contract, but may proceed upon *quantum meruit* for the recovery of the reasonable value of such services. In such event, however, plaintiff's recovery is limited to the contract price; that is to say, he may recover the reasonable value of his services not exceeding the contract price. The contract is admissible in evidence, and the rights of the parties are to be determined in accordance with it. This question is fully discussed in *American Surety Co. v. Fruin-Bambrick Construction Co.*, 182 Mo. App. 667, 166 S. W. 333, in an opinion by NORTON, J., where many authorities will be found cited.

In the instant case the special contract price limited plaintiff's compensation to \$50 per week—except in so far as the agreement purported to bind the State Committee as such. It did not purport to and could not bind the contestees for the payment of additional compensation to plaintiff. And no recovery can be had against the contestees upon *quantum meruit* in the face of the express terms of the agreement made.

And furthermore, one who is benefited by work performed is not liable therefor if credit is given solely to another at whose request it is performed. [See 40 Cyc. p. 2838.] The evidence shows that plaintiff performed his services relying entirely upon Judge Spencer and the State Committee to compensate him therefor. And as to this it matters not that the agreement, under the circumstances, failed to obligate the individual members of the Committee, who had naught to do with the matter.

The action of the trial court in refusing to order the issuance of a subpoena *duces tecum*, upon plaintiff's application therefor, is assigned as error. Plaintiff sought to have such subpoena issued against Mr. Thomas K. Niedringhaus, then treasurer of the Republican State Committee, to compel the production of his books as such treasurer. Such application was made for the purpose of attempting to show that prior to the suit the Committee was "in funds," and had the means wherewith to pay plaintiff's claim. Touching this matter there was some conflict in the evidence as to whether plaintiff was relying upon the Committee to pay his claims when it had funds available, or in the event that sufficient funds were obtained by it for the purposes of the contests.

But this entire matter becomes immaterial in the view which we take of this case. It cannot matter whether the Committee had funds on hand for contest purposes, or otherwise, so far as concerns the personal liability of any of these defendants. Though there was evidence that, from the time of plaintiff's engagement to that of the trial, the Committee was always in debt to the extent of some thousands of dollars, if the question of the Committee's financial affairs were here involved, the propriety of the ruling of the trial court respecting the issuance of the subpoena upon the Committee's treasurer would demand our consideration. Under the circumstances, however, this ruling need not be reviewed.

Other questions are raised, but they are either not controlling or are disposed of by what we have said above.

The judgment must be affirmed; and it is so ordered. *Reynolds, P. J.*, concurs. *Nortoni, J.*, not sitting.

EDWARD DAVID, Appellant, v. CLARKSVILLE  
CIDER COMPANY, Respondent.

St. Louis Court of Appeals, December 8, 1914.

1. **MASTER AND SERVANT: Injury to Servant: Safe Place to Work: Evidence.** In an action for injuries received by a servant by a barrel falling from a stack of barrels upon him, evidence by plaintiff, who had not observed how the barrels were piled, that "the barrels were piled too shaky—that is how it happened," was a statement of a mere conclusion, and hence possessed no probative force toward establishing that the barrels were piled in a negligent manner.
2. **EVIDENCE: Conclusions.** The conclusion of a witness has no probative force.
3. **MASTER AND SERVANT: Injury to Servant: Safe Place to Work: Sufficiency of Evidence.** In an action for injuries received by a servant by a barrel falling from a stack of barrels upon him, where the petition assigned as negligence that defendant had stacked the barrels in a place where, because of traffic, the ground was caused to vibrate, resulting in the stack becoming insecure and dangerous, and also that the barrels were negligently stacked, evidence held insufficient to show that the fall was due to the vibration of the ground at the place where the barrels were stacked, or that the barrels were negligently stacked, or if, in fact, they were negligently stacked, that defendant had notice thereof, and hence plaintiff was not entitled to recover.
4. ———: ———: ———: **Fellow-Servants.** Where a cooper employed by a cider company was required, when so directed, to assist in stacking barrels ready for delivery, other servants who stacked the barrels, which subsequently fell on the cooper, were fellow-servants, for whose negligence the master was not liable.
5. ———: ———: ———: **Res Ipsa Loquitur.** The doctrine of *res ipsa loquitur* does not apply, where the injury to a servant was caused by the falling of a barrel from a stack near where he was working.

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey*, Judge.

**AFFIRMED.**

*Kinealy & Kinealy* for appellant.

(1) It is the duty of the master to furnish the servant a reasonably safe place to work in. *Holman v. Souther Iron Co.*, 152 Mo. App. 672; *Anderson v. Western Coal & M. Co.*, 138 Mo. App. 76; *Clark v. Union Iron & Foundry Co.*, 234 Mo. 436. (2) It was negligence in defendant to pile these barrels in this place in such a "shaky" manner that they were likely to fall. *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 318; *Browning v. Kasten*, 107 Mo. App. 59. (3) The vibrations of this passageway where these barrels were piled made it an unsafe place for the plaintiff to work in. *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 297. (4) Plaintiff was not a fellow servant with the porter who did the piling because he did not help to do the piling, but even if he were, defendant would still be liable because its negligence co-operated with that of the porter in causing the injury. *Browning v. Railroad*, 124 Mo. 55; *Mertz v. Leschen & Sons Rope Co.*, 174 Mo. App. 94; *Radtke v. Basket & Box Co.*, 229 Mo. 15.

*Holland, Rutledge & Lashly* for respondent.

(1) The lower court did not err in giving the peremptory instruction at the instance of respondent, because there was no testimony in the case showing or tending to show that the respondent was guilty of any negligence in connection with the stacking of barrels in question. *Bradley v. Forbes Tea & Coffee Co.*, 213 Mo. 320; *Sutherland v. Lumber Co.*, 149 Mo. App. 338; *Bowman v. American Car & Foundry Co.*, 226 Mo. 53; *Kelly v. Railroad*, 105 Mo. App. 365; *Henson v. Armour*, 113 Mo. App. 618; *Livengood v. Zinc Co.*, 179 Mo. 229. (2) And because the testimony shows

that appellant did not exercise ordinary care for his own safety on the said occasion. *Bradley v. Forbes Tea & Coffee Co.*, 213 Mo. 320; *Sutherland v. Lumber Co.*, 149 Mo. App. 338; *Bowman v. American Car & Foundry Co.*, 149 Mo. App. 338; *Kelly v. Railroad*, 105 Mo. App. 365; *Henson v. Armour*, 113 Mo. App. 618; *Livengood v. Zinc Co.* 179 Mo. 229.

ALLEN, J.—This is an action for personal injuries sustained by plaintiff while in the employ of the defendant corporation as its servant. Plaintiff suffered a nonsuit below, and, after unsuccessfully moving to have the same set aside, prosecuted his appeal to this court.

At the time of plaintiff's injury he was employed by the defendant as a cooper, engaged in repairing barrels and kegs. From time to time he was also called upon to assist in handling barrels. Defendant's business was conducted in a building formerly used as a brewery, and beneath the premises were large excavations or artificial caves in one of which plaintiff worked when performing the duties of a cooper. Above such caves was a yard or court, through which a driveway extended.

On Saturday afternoon, November 4, 1911, plaintiff was directed to assist in rolling certain barrels from the sidewalk adjoining the premises into the yard where they were to be stacked. It appears that the work of putting in and stacking such barrels was ordinarily performed by certain "porters," though plaintiff at times assisted both in rolling in barrels and in stacking them. Plaintiff testified, however, that upon this Saturday afternoon he stacked none of the barrels, but rolled in some of them shortly before five o'clock, his quitting time, and that others did the stacking. On the following Monday morning plaintiff was ordered to assist in loading barrels upon a wagon which had been driven into the yard upon the drive-

way. It appears that along one side of the driveway stood a row of barrels standing upright, upon the top of each of which was a barrel lying lengthwise or horizontally, and that about two feet back of this row stood a row of stacks or tiers each consisting of three upright barrels, one upon another. At the time of plaintiff's injury he was engaged in lifting one of the horizontal barrels lying upon the top of another in the first row along the side of the driveway. As he took hold of this barrel to load it into the wagon, a barrel, from the top of the nearest of the tiers consisting of three barrels, fell upon his hand, crushing two of his fingers so that they had to be amputated.

The negligence charged in the petition, and which it said caused plaintiff's injuries, is that the surface of the driveway, by reason of the caves beneath the same, was caused to shake and vibrate from the passage of cars and vehicles along the adjoining street, which caused the barrels stacked along or near the same to become "insecure and dangerous and likely to fall;" and that the barrels in the stack or tier from which the barrel in question fell were carelessly and negligently piled or stacked; which matters are alleged to have been known to defendant, or could have been discovered by defendant by the exercise of ordinary care. And it is averred that, by reason of the negligence charged, the driveway was a dangerous and unsafe place for plaintiff to work.

The answer is a general denial and a plea of contributory negligence.

Plaintiff's evidence is to the effect that the surface of the premises above the caves was caused to vibrate considerably, from time to time, by cars and heavy vehicles passing along the nearby street, and particularly by wagons driving through the yard along the driveway, which shook the barrels stacked in the yard. But there is positive testimony that no wagon was moving in the driveway at the time of plaintiff's

injury; and there is no evidence that any vibration from cars or vehicles passing along the street actually caused, or contributed to cause, this barrel to fall, nor proof of facts from which this could be fairly and reasonably inferred.

One witness, when asked if he saw the barrels shaking in the yard at the time of the accident, said: "Yes, sir, I did; I seen them." In answer to further questions, he said that this was due to the heavy vehicles moving through the driveway, saying that a wagon was moving through the same at the time to which he referred. He then stated that no wagon went through the driveway at "the same moment" when plaintiff was injured, and could not have done so for the reason that two wagons were then standing therein. This testimony cannot be taken to mean that there was any shaking of the barrels by reason of the alleged vibration of the premises at the time when the barrel fell upon plaintiff's hand. And there is none other tending to show this. And it is certain that there was nothing shown as to the effect of any vibration, if such there was, upon the stack of barrels in question, nor anything tending to show that the top barrel thereof was thereby caused to fall. What the tendency of the surface of the premises to vibrate had to do with the falling of the barrel, if anything, is purely a matter of conjecture.

As to the alleged negligent piling of the barrels, nothing whatsoever appears as to the manner in which the barrels were stacked in the tier from the top of which the barrel in question fell. Nor is there any evidence whatsoever as to the condition of this tier or stack prior to the falling of the barrel therefrom. True, there is plaintiff's general statement as to the happening of the accident, viz: "The barrels was piled too shaky; that is how it happened." But this is clearly a mere conclusion on his part, and without probative



force; for he repeatedly declared that he did not observe this stack of barrels at all prior to the accident, and paid no attention whatsoever to its condition or how the barrels were stacked therein.

The barrel which plaintiff was lifting gave no lateral support to the tier behind it from which the barrel fell, for the testimony is that there was an intervening space of about two feet between the barrels at the edge of the driveway, which were being loaded, and the row of tiers behind them. It is clear, therefore, that the falling of the barrel was not due to any act of plaintiff in removing lateral support from the stack containing it. But there is no evidence that the barrels had been negligently piled in this stack, in such manner as to render the stack dangerous and likely to fall. And if the stack was in fact in a dangerous condition (as to which nothing appears), it is not shown that the defendant, though a vice-principal or otherwise, had any notice thereof; nor is there anything in the record to show when such dangerous condition, if any, began, unless indeed we are to infer, from the fact alone that the barrel fell, that the stack from which it fell was negligently erected on the preceding Saturday afternoon, whereby a dangerous condition was created which continued until the time of the accident.

From the record before us we think nothing appears than can cast liability on defendant for plaintiff's injuries. Plaintiff and his collaborators who stacked the barrels in this yard were undoubtedly fellow-servants; for though plaintiff says that he did not assist in stacking these barrels, it was his duty to assist in the stacking and loading of barrels when so directed, and he did so from time to time. But it is said, that though this be conceded, defendant is nevertheless liable for the reason that it was negligent in using this "shaky place" for piling barrels, and that such negligence on its part co-operated with that of a fellow servant to produce the injury. But this theory we regarded as

untenable, for the reason that liability cannot be predicated upon the vibration of the premises under the evidence relating to this matter, which we have set out above. And conceding, for the sake of argument only, that liability may arise from the supposed negligence of plaintiff's collaborators in piling the barrels, upon the theory that a dangerous condition of the premises was thereby created, which defendant by the exercise of ordinary care could have discovered, surely such negligence in the erection of the stack of barrels or the existence of such dangerous condition, must be in some manner established.

It is not suggested that the maxim *res ipsa loquitur* here applies; nor does it. It is said not to be inapplicable merely because of the existence of the relation of master and servant (*Klebe v. Distilling Co.*, 207 Mo. 480, 105 S. W. 1057); but for the reasons mentioned in the case just cited, if none other, the doctrine would not here apply. And it is clear that, in the absence of any evidence touching the matter, we are asked to infer a negligent erection or dangerous condition of the stack of barrels from the fact alone that a barrel fell therefrom.

The case is not like that of *Rigsby v. Oil Well Co.*, 115 Mo. App. 297, 91 S. W. 460; 130 Mo. App. 128, 108 S. W. 1128; where the defendant's foreman created a dangerous place, through the negligent erection of a pile of lumber, and, knowing such place to be unsafe, ordered the plaintiff to go into it. Neither are the facts quite such as were presented in *Bradley v. Forbes Tea & Coffee Co.*, 213 Mo. 320, 111 S. W. 919, where a recovery was denied the servant; for there a stack of bags of coffee bulged and fell because of the taking away of another such stack which gave it lateral support, and in which work the plaintiff was engaged.

The case is much like that of *Bowman v. Car & Foundry Co.*, 226 Mo. 53, 125 S. W. 1120, where plaintiff was engaged in helping to pile pig iron near an

old pile thereof which fell and injured him. In an opinion by VALLIANT, J., it is said:

“There was no evidence of negligence on the part of the defendants to justify the submission of the case to the jury. . . . There was no evidence that the pile that fell was negligently constructed or that it contained a defect, that was known or could have been known by the exercise of ordinary care. . . . The petition charges that it ‘had been so piled and placed as that it was liable to fall over at any time,’ but it does not specify in what particular it was defective. Under that averment (assuming without conceding that it was sufficient to state an act of negligence) the plaintiff could have introduced evidence to prove any defect in the construction or location of the pile that would indicate its dangerous condition, as that it was leaning to one side, or was not compact or otherwise, but the only thing he attempted to prove was that it was higher than usual. He offered no evidence to show that the height rendered it dangerous. Men of experience in that business could have been found to testify that the height of seven or eight feet rendered the pile dangerous if such was the fact, but neither the court nor the jury could take judicial cognizance that such was the fact. Yet with no evidence except that the pile was seven or eight feet high the jury was left to conjecture that from that fact alone it was dangerous. . . . The burden was on the plaintiff to show that the pile fell because of its own inherent defect, and that it was a defect which the defendants knew or would have known if they had exercised reasonable care.”

In the case before us no evidence whatsoever was adduced touching the condition of this stack of barrels. It does appear that it consisted of three barrels, one upon another; but there is nothing to suggest that this rendered it dangerous. Regardless of other questions involved, had the demurrer been overruled, the jury

would have been left to grope in the dark, and authorized to base a verdict, if they so saw fit, upon a mere conjecture that the stack of barrels was in a dangerous condition, through negligent piling or otherwise, and that such dangerous condition had existed for such length of time and was of such character as to enable the defendant to discover the same by the exercise of ordinary care.

We do not mean to say that liability could attach to the master for a dangerous condition created by the negligence of plaintiff's fellow-servants in piling these barrels, had such been shown. As to this it is sufficient to say that nothing whatsoever appeared as to the erection of the stack which fell or its condition prior to the accident. But see: *Sutherland v. Lumber Co.*, 149 Mo. App. 338, 130 S. W. 40; *Dickerson v. Jenkins*, 144 Mo. App. 132, 128 S. W. 280.

Neither is it necessary to decide whether plaintiff himself should be regarded as negligent, as a matter of law. In his testimony he reiterated time and again that he did not look to see how the barrels were piled, did not notice them, or pay any attention whatsoever to the condition of the stacks. Under the circumstances shown in evidence the question of plaintiff's negligence in failing to observe his surroundings, or to take any heed for his own safety, would be an important factor to be reckoned with, were the case not disposed of on other grounds. [See *Bradley v. Forbes Tea & Coffee Co.* supra.]

The judgment must be affirmed, and it is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

JOHN H. WIEST, Appellant, v. UNITED STATES  
HEALTH & ACCIDENT INSURANCE COM-  
PANY OF SAGINAW, MICHIGAN, Respon-  
dent.

St. Louis Court of Appeals, December 8, 1914.

1. **ACCIDENT INSURANCE: Loss of Hand or Foot: Construction of Policies.** Where an accident insurance policy provides for indemnification against "loss" of a hand or foot, actual physical severance of such member is not necessary to warrant a recovery, but it is sufficient if insured is wholly and permanently deprived of the use thereof; and even where the policy provides that "loss" means "actual amputation," it is not essential to a recovery that the entire member be severed, but is sufficient if so much thereof is severed as to leave the remainder useless for all practical purposes.
2. **INSURANCE: Construction of Policy.** Any ambiguity or uncertainty of meaning in an insurance policy should be resolved in favor of insured and against insurer.
3. **ACCIDENT INSURANCE: Loss of Hand: Severance: Policy Construed.** An accident insurance policy indemnifying against loss of a hand, but which provides that such loss shall mean "loss by severance at or above the wrist joints," does not cover a loss of the entire hand with the exception of the little finger and a portion of the palm supporting it, although such finger and portion of the palm are permanently paralyzed and of no use or service to insured.

Appeal from St. Louis City Circuit Court.—*Hon. J.  
Hugo Grimm*, Judge.

**AFFIRMED.**

*Henry B. Davis, Charles Erd and Carlisle Durfee*  
for appellant.

(1) Where the policy provides for the payment of an indemnity for the loss of one entire hand or foot, or the loss of two entire hands or feet, it is not necessary, in order to recover thereunder, that

there should be an actual physical severance of the member from the body. Any loss which renders it practically useless is sufficient. 1 Cyc. p. 272, and cases cited; 5 Words & Phrases, p. 4236; *Sisson v. Sup. Ct. of Honor*, 104 Mo. App. 60; *Sheanon v. Pac. Mut. Ins. Co.*, 77 Wis. 618; *Lord v. Am. Mut. Acc. Assn.*, 89 Wis. 19; *Sneck v. Trav. Ins. Co.*, 88 Hun 94; *Gahagan v. Morrissey*, 3 Lack. Leg. N. 168; *Garcelon v. Com. Trav. Assn.*, 184 Mass. 8; *Fuller v. Locomotive Eng. Mut. Life & Acc. Ins. Assn.*, 122 Mich. 548. (2) The rule is well settled by an unbroken line of decisions in Missouri, that where the provisions of a policy are capable of two interpretations, that meaning must be applied which is the most favorable to the assured, even though it was intended otherwise by the insurer. *Mathews v. Modern Woodman*, 236 Mo. 326; *Stix v. Indemnity Co.*, 175 Mo. App. 171; *Dezell v. Fidelity & Casualty Co.*, 176 Mo. 253, 265; *Head v. Ins. Co.*, 241 Mo. 403; *Renshaw v. Ins. Co.*, 103 Mo. 597; *Brown v. Assurance Co.*, 45 Mo. 221; *Mining Co. v. Casualty Co.*, 162 Mo. App. 191; *Renn v. Supreme Lodge*, 83 Mo. App. 442, 447; *Cunningham v. Union C. & S. Co.*, 82 Mo. App. 614; *Norman v. Ins. Co.*, 74 Mo. App. 456; *Burnett v. Ins. Co.*, 68 Mo. App. 343; *Hoffman v. Ins. Co.*, 56 Mo. App. 301; *Ethington v. Ins. Co.*, 55 Mo. App. 129; *Hale v. Ins. Co.*, 46 Mo. App. 508; *La Force v. Ins. Co.*, 43 Mo. App. 530.

*Collins, Barker & Britton and C. K. Rowland for respondent.*

It is the duty of courts to construe contracts and to ascertain their meaning from all of the provisions thereof and not from single words or phrases or sentences, but, when there is no ambiguity or uncertainty in the terms used, there is no room for the application of the technical rules of construction. *Matthews v. Modern Woodmen*, 236 Mo. 342; *Meyer v. Christopher*,

176 Mo. 549; Calloway v. Henderson, 130 Mo. 77; Lovelace v. Travelers, Etc., 126 Mo. 105; Carr v. Lackland, 112 Mo. 460; Koehring v. Muemminghoff, 61 Mo. 407; Stix v. Indemnity Co., 175 Mo. App. 179; Counts v. Medley, 163 Mo. App. 555; Johnson v. Dalrymple, 140 Mo. App. 241; Webb v. Ins. Co., 134 Mo. App. 580; Realty Company v. Brewing Assn., 133 Mo. App. 268; Walker v. Automobile Co., 124 Mo. App. 636; Magin v. Lancaster, 100 Mo. App. 130; Mo. Edison Co. v. Bry, 88 Mo. App. 138; Trust Co. v. York, 81 Mo. App. 346; Sachleben v. Wolff, 61 Mo. App. 36.

ALLEN, J.—This is a suit upon an accident insurance policy, for the recovery of the “principal sum” of the policy, to-wit, \$2,000, for the alleged “loss of one hand” by the assured within the meaning of the contract of insurance. Plaintiff suffered a nonsuit below, and, after unsuccessfully moving to have the same set aside, has appealed to this court.

By the policy sued upon the respondent company agreed to pay the said principal sum thereof for (among other things) the “loss of one hand,” sustained by the assured solely through external, violent and accidental means. Immediately following this section of the policy referring to specific losses appears the following stipulation, viz:

“In every case referred to in this policy, the loss of any member or members above specified shall mean loss by severance at or above the wrist joints or ankle joints.”

The evidence is to the effect that plaintiff received injuries to his left hand, solely through external, violent and accidental means, necessitating the amputation of the greater part thereof. The thumb and first three fingers were removed, together with a large portion of the palm, leaving only the little finger and a part of the palm supporting it. As a result of the injury, however, the little finger and the portion of the

palm remaining were found to be permanently paralysed and of no use or service to the assured. Plaintiff has therefore lost the entire use of his hand, as completely as if the same had been severed at the wrist joint.

It is conceded that plaintiff proved all of the facts necessary to entitle him to a verdict for the principal sum of the policy, provided a recovery thereof may be had under the policy upon evidence disclosing the total loss of the use of the hand, as above stated, without proof of the actual physical severance thereof at or above the wrist joint.

It is well settled that where, in an insurance contract of this character, the insurer indemnifies against the "loss" of a hand or of a foot, actual physical severance of such member is not necessary to authorize a recovery under the policy, but it is sufficient if the assured has been wholly and permanently deprived of the use thereof. If by injury within the terms of the contract, the assured has been entirely deprived of the use of such member, he has suffered a "loss" thereof, within the meaning of this term, as fully as though the same had been actually amputated. [See *Sisson v. Supreme Court of Honor*, 104 Mo. App. 54, 78 S. W. 297; *Sheanon v. Insurance Co.*, 77 Wis. 618; *Lord v. Accident Ass'n.*, 89 Wis. 19; *Supreme Court of Honor v. Turner*, 99 Ill. App. 310; Fuller, *Accident & Employers' Liability Insurance* (1913) p. 350, et seq; 2 Bacon, *Benefit Societies and Life Insurance* (3 Ed.) sec. 502; 1 Am. and Eng. Ency. Law, p. 301; 1 Cyc. 272.]

And where the contract of insurance indemnifies the assured for "loss by severance" of one hand, instead of insuring against the "loss of a hand," it is held not to be necessary that the entire hand, anatomically speaking, be removed; but if a large portion thereof be severed, and that which remains be abso-



lutely useless, the insured may recover as for the loss of a hand by severance.

In *Sneck v. Insurance Co.*, 88 Hun 331, the policy provided that the assured would be entitled to receive a certain sum "if loss by severance of one entire hand or foot" should result from injuries of the character insured against. About one-half of the assured's hand was cut off by a planer, and the evidence was that the remainder thereof was absolutely useless. It was said that the undertaking to indemnify the assured against loss by severance of one entire hand had reference not alone to an injury which required the amputation of the entire hand, in the strict anatomical sense, but that the effect as well as the extent of the loss by severance was to be considered in determining whether, within the terms of the contract, the "entire hand" was gone. And it was said that the specification in the policy was intended to refer to the manner, rather than to the exact physical extent, of the injury.

And where it is provided that the "loss" of an arm or leg shall mean "actual amputation," it is not necessary to a recovery that the entire arm or leg shall have been severed. It is sufficient if so much thereof is severed as to leave the remainder useless for all practical purposes to which it may be put by the assured.

In *Garcelon v. Accident Ass'n.*, 184 Mass. 8 (100 Am. St. Rep. 540), it was held that the amputation of an arm four inches below the elbow, was a "loss" of the arm within the meaning of a stipulation to the effect that the word "loss" as applied to arm or leg should mean "actual amputation."

And in *Gahagan v. Morrissey*, 19 Pa. Co. Ct., 238, 6 Pa. Dist. R. 135, where the contract of insurance provided that for the "loss of a hand at or above the wrist joint" the insured should be considered totally disabled, it was held that the entire loss of the use of

the hand might be fairly regarded as coming within the legitimate application of the terms of the policy.

In none of these cases, however, was the language employed in the contract of insurance such as that contained in the clause before us. Where the assured has lost the entire use of a hand by the severance of a large portion thereof, he may be said to have suffered a "loss" of the hand "by severance," as was held in *Sneck v. Insurance Co.*, supra. And though it is provided that the word "loss" shall mean actual amputation, the amputation of an arm below the elbow may well be regarded as the loss of the arm within the meaning of this stipulation, as in *Garcelon v. Accident Ass'n.*, supra. In such case the assured, by "severance" or "amputation," has suffered a loss of the member in question, in that he has, in such manner, lost the entire use thereof.

Likewise it may well be held "that the loss of a hand at or above the wrist joint" is sustained where the assured has lost the total use of a hand, as in *Gahagan v. Morrissey*, supra; for then the assured has lost the use of the hand to the extent specified, to-wit, to the writ joint.

But here the policy provides that the loss of a hand shall mean loss by *severance at or above the wrist joint*. Not only is it provided that the loss of such member shall be by physical severance thereof, but the extent of such loss is made exact and definite by locating the precise point at or above which such severance shall take place.

In *Fuller v. Insurance Ass'n.*, 122 Mich. 548, it was held that a by-law of a mutual benefit association providing that any member receiving bodily injuries which alone should "cause amputation of a limb (whole hand or foot)" would be entitled to certain benefits, did not cover the case of an amputation of about one-third of the foot, though the foot was ren-

dered useless for the performance of its natural functions.

And in *Chevaliers v. Shearer*, 27 Ohio Cir. Ct. R. 509, the constitution of the association defined "the loss of a hand" as meaning "amputation at or above the wrist." As a result of injuries, plaintiff's right arm was permanently disabled, whereby he lost the entire use thereof, but neither the arm nor hand had been amputated. It was held that the plaintiff could not recover.

In the instant case, had the provision of the policy agreeing to indemnify plaintiff in the amount of the principal sum of the policy for the "loss of one hand" stood entirely alone, and unaffected by any other provision thereof, beyond doubt plaintiff would have been entitled to recover, having lost the entire use of his hand. However, the very next paragraph of the policy provides, in unmistakable terms, what shall be meant by the "loss of one hand," to-wit, the loss thereof by severance at or above the wrist joint. Plaintiff has not suffered a loss of his hand by severance at or above the wrist joint; and if effect is to be given to the last mentioned provision plaintiff's case must fail.

If any ambiguity or uncertainty of meaning could be said to inhere in the pertinent provisions of the policy, it would readily be resolved in favor of the insured and against the insurer. Such is the well established and wholesome doctrine with respect to the construction of insurance contracts. As is said by LAMM, J., in *Mathews v. Modern Woodmen*, 236 Mo. 1. c. 342, 139 S. W. 151:

"It is a just and settled rule that the restrictive terms of insurance contracts shall be taken most strong against the insurer. The doctrine of *contra proferentem* is strictly applied with unaccommodating vigor, and . . . ambiguities are blandly resolved in favor of the insured."

If it appeared that the portions of the policy under consideration, when read and construed together, were at all ambiguous or of doubtful import, we should not hesitate in the least to "blandly" resolve such ambiguity or doubt in favor of the insured. Indeed, the policy, should, if possible, be construed so as to effectuate the insurance and not to defeat it; for the indemnity is the very object and purpose of the contract, for which the insured has paid a consideration. [See *Stix v. Indemnity Co.*, 175 Mo. App. 171, 157 S. W. 870.]

But it appears that the defendant has chosen apt language to indicate that it does not agree to indemnify the insured for the loss of a hand, unless such loss shall consist in the actual physical severance of the hand at or above the wrist joint. It is by no means likely that the policy-holder so understood, or that he would knowingly have accepted the policy with such restrictive limitations upon his right to recover the indemnity for the loss of a hand or foot; but we can find the intention of the parties only from the language employed in the contract, having regard to the rules of interpretation which may be applied to contracts of this character. We cannot "blandly" construe the troublesome provision out of the contract, and disregard it altogether; for however great may be our inclination or duty to protect a policy-holder against intricate or obscure technical provisions designed for the avoidance of liability on the part of the insurer, we cannot make a contract for the parties.

The stipulation in question, as we have said, follows immediately that portion of the policy providing for specific losses, in the same type in which the body of the policy is printed. Its meaning appears to be plain and unmistakable. It pointedly defines what shall constitute the "loss of a hand" so as to entitle the assured to the indemnity provided therefor. Under the circumstances it cannot well be said to consti-

tute a "snare to the unwary" such as is denounced in *LaForce v. Insurance Co.*, 43 Mo. App. 530. See, also, *Stark v. Insurance Co.*, 176 Mo. App. 574, 159 S. W. 758. Nor do we perceive any ground upon which plaintiff may properly be relieved from the effect thereof.

Our conclusion is that the learned trial judge committed no error in forcing plaintiff to a nonsuit. The judgment must therefore be affirmed. It is so ordered. *Reynolds, P. J.*, and *Norton, J.*, concur.

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MICHAEL WARNKE, Respondent, v. A. LESCHEN  
& SONS ROPE COMPANY, Appellant.

St. Louis Court of Appeals, December 8, 1914.

1. **MASTER AND SERVANT: Injury to Minor Servant: Physical Facts.** In an action for injuries to plaintiff's minor son, while in defendant's employ, caused by a steel wire springing from pliers held by the boy and striking him in the eye, while he was carrying out defendant's order to splice together the two ends of the wire, which had broken, *held* that the testimony given by the boy as to the manner in which he received his injury was not opposed to the physical facts, so as to require that it be rejected.
2. **EVIDENCE: Physical Facts.** Testimony cannot be rejected as being opposed to the physical facts unless it is plainly and palpably incompatible with physical laws or undisputed facts.
3. **MASTER AND SERVANT: Injury to Minor Servant: Failure to Warn: Sufficiency of Evidence.** In an action for injuries to plaintiff's minor son, while employed in winding steel wire on spools, evidence that, after a wire had caught on a defective pulley and broken, defendant's foreman ordered the boy to get the wire out and splice it, without giving him instructions or warning him of the danger, and that the boy was injured by the wire slipping from his pliers and striking him in the eye, while he was engaged in carrying out the order, *held* sufficient to warrant a finding that the master was negligent.

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4. ———: ———: ———: **Instructions.** In an action for injuries to plaintiff's minor son, while in defendant's employ, caused by a steel wire springing from pliers held by the boy and striking him in the eye, while he was carrying out defendant's order to splice together the two ends of the wire, which had broken by reason of being caught on a defective pulley, *held* that an instruction given for plaintiff, which submitted the question of defendant's negligence, although unnecessarily long and somewhat lacking in clearness, was not erroneous as being misleading or confusing.

5. ———: ———: ———: **Instructions: Assumption of Facts.** In an action for injuries to plaintiff's minor son, while in defendant's employ, caused by a steel wire springing from pliers held by the boy and striking him in the eye, while he was carrying out defendant's order to splice together the two ends of the wire, which had broken by reason of being caught on a defective pulley, *held* that an instruction given for plaintiff, which submitted the question of defendant's negligence, did not assume that the pulley was defective or that the wire broke, by reason of requiring the jury to "further find from the evidence that in attempting to splice the wire it sank into and caught in said defective pulley," where a former part of the instruction required the jury to find that the pulley was defective and that the wire broke as a result thereof.

6. ———: ———: ———: **Instructions: Conformity to Issues.** In an action for injuries to plaintiff's minor son, while in defendant's employ, caused by a steel wire springing from pliers held by the boy and striking him in the eye, while he was carrying out defendant's order to splice together the two ends of the wire, which had broken by reason of being caught on a defective pulley, the petition alleged, among other things, that the pulley was "badly worn, out of repair, unfit for use, and the wire in question would sink into and catch therein, thereby causing said wire to break; and that it was dangerous to splice said wire because of the difficulty of putting such broken wire over and under said defective, out-of-repair and unfit pulley, in that said wire would sink into and catch in said badly worn, defective and unfit pulley." An instruction given for plaintiff required the jury to find that the pulley was defective and out of repair, and that, on account thereof, the wire became caught in the pulley and sank into it. *Held*, that, while the instruction was not entirely free from criticism, the giving of it did not constitute reversible error on the ground that it was broader than the petition, especially in view of the fact that the gravamen of the charge of negligence was the negligence of the foreman in ordering the boy to splice the wire without giving him instructions or warning him of the danger.

7. ———: ———: ———: Sufficiency of Evidence. In an action for injuries to plaintiff's minor son, while in defendant's employ, caused by a steel wire springing from pliers held by the boy and striking him in the eye, while he was carrying out defendant's order to splice together the two ends of the wire, which had broken by reason of being caught on a defective pulley, evidence held sufficient to warrant a finding that it was not reasonably safe for defendant's foreman to order the boy to undertake to splice the wire, under the circumstances, and to warrant a finding that the boy needed instruction in splicing the wire, and that he applied to the foreman for such instruction, but received none.
8. DAMAGES: Instructions: Allowing Excessive Recovery: Harmless Error. In an action for personal injuries, the instruction on the measure of damages was not prejudicially erroneous, by reason of the fact that it authorized the jury to allow damages for certain items up to a certain amount (not exceeding the amount claimed therefor in the petition), which amounts were greater, by \$4.60, than the amounts shown by the evidence, since it will not be assumed that the jury disregarded the evidence and found the full amount authorized by the instruction.
9. ———: ———: ———: ———. In an action for injuries to plaintiff's minor son, the instruction on the measure of damages was not prejudicially erroneous for authorizing the jury to award damages for future loss of earnings, in the absence of any evidence tending to show that such loss would be sustained, where the verdict was for less than the loss of earnings shown to have accrued up to the time of the trial, in view of sections 1850 and 2082, R. S. 1909, requiring the appellate court to disregard errors not affecting the substantial rights of the parties.

Appeal from St. Louis City Circuit Court.—*Hon J. Hugo Grimm*, Judge.

**AFFIRMED.**

*Watts, Gentry & Lee* for appellant.

(1) The court erred in overruling the demurrers to the evidence, because the plaintiff's son's own story shows that it was physically impossible for him to have been injured in the manner in which he claims. Where the testimony offered by plaintiff and relied upon by

him to make out his case utterly at variance with physical facts, it is the duty of the court to give a peremptory instruction for the defendant. *Artz v. Railroad*, 34 Iowa 159; *Maryland v. Railroad*, 16 Atl. Rep. 623; *Meyers v. Railroad*, 24 Atl. Rep. 747; *Carroll v. Railroad*, 12 Wkly. Notes Cas. 348; *Kelsay v. Railroad*, 129 Mo. 374; *Nugent v. Milling Co.*, 131 Mo. 252; *Weltmer v. Bishop*, 171 Mo. 116; *New v. Railroad*, 114 Mo. App. 385; *Gurley v. Railroad*, 104 Mo. 233; *Scroggins v. Railroad*, 138 Mo. App. 220; *Schaub v. Railroad*, 133 Mo. App. 444; *Blumenthal v. Railroad*, 97 Maine 255; *McKinley v. Street Rd.*, 86 N. Y. Supp. 461; *Payne v. Railroad*, 136 Mo. 575. (2) The court gave erroneous instructions: Instruction number 1 given for the plaintiff is erroneous. The instruction covers nearly two pages of printed matter, is drawn in a loose, rambling fashion, does not clearly define the issues, and is very misleading. This instruction assumes that the pulley in question was defective and out of repair, and also assumes that the wire broke. These were controverted questions, and it was error to assume the truth of them. *Minnier v. Railroad*, 167 Mo. 99; *Blasland, etc., Co. v. Hilig*, 70 Mo. App. 301; *Orscheln v. Scott*, 79 Mo. App. 534; *Hull v. St. Louis*, 138 Mo. 617; *Fullerton v. Fordyce*, 121 Mo. 1; *Linn v. Massilon Bridge Co.*, 78 Mo. App. 11. The petition limited the defective condition of the pulley by specific allegations as to how it was defective, and the only evidence of any defective condition was that of plaintiff's son, to the effect that a deep, narrow notch was worn in the surface of the pulley. But this instruction does not limit the consideration of the jury to any particular defect, but permits them to find that it was defective in any way. It is error to give an instruction that thus broadens the issues. It should have limited the defect to the specific conditions which the evidence tended to prove. *Casey v. Bridge Co.*, 114 Mo. App.



64; Schroeder v. Transit Co., 111 Mo. App. 75; Delo v. Mining Co., 160 Mo. App. 45; Schaaff v. Box & Basket Co., 131 S. W. 937; Mulderig v. Railroad *et al*, 116 Mo. App. 655; Sommers v. Transit Co., 108 Mo. App. 319. This instruction makes it the absolute duty of the foreman to instruct and warn the plaintiff's son, regardless of whether or not the boy needed instruction or warning, and though the evidence wholly fails to show that he needed either warning or instruction. His own testimony shows that he had three years' experience in handling and welding wire. (3) The instruction on the measure of damages erroneously permits recovery for future loss of the earnings of plaintiff's son, when there was no evidence tending to show that there would be any loss of earnings between the date of the trial and the time when his son would arrive at the age of twenty-one years. It is error to include in an instruction on the measure of damages an item which was not pleaded and proven. Moellmann v. Geise-Henselmeier Lumber Co., 134 Mo. App. 485; Gibler v. Railroad, 203 Mo. 208; Waldopfel v. Transit Co., 102 Mo. App. 524. (4) The verdict is excessive. No evidence pointed to future loss of the boy's earnings or to the need of any future expenses—hence, the damage was complete. That damage, by actual calculation, was only \$588.20. The verdict was for \$1,000.

*S. P. Bond* for respondent.

(1) It is the duty of a master to notify a minor servant of the ordinary risks and dangers of his employment, which the master knows or which a master of ordinary prudence and intelligence would under like circumstances know the minor does not understand or appreciate and to instruct him how to avoid it. Labat on Master and Servant, sec. 558, p. 558; Mertz v. Leschen & Sons Rope Co., 174 Mo. App. 94,

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158 S. W. 807, 811; Bohn Mfg. Co. v. Erickson et al., 50 Fed 942; Cleveland Rolling Mill Co. v. Carrigan, 46 Ohio, 283, 292, 295; Railroad v. Adams, 105 Ind. 161, 163, 165; New Albany Forge & Rolling Mill v. Cooper, 113 Ind. 363; Haynes v. Colchester Mills, 69 Vt. 1, 5; Connors v. Grilley, 155 Mass. 575; Glover v. Dwight Mfg. Co., 148 Mass. 22, 23; Jarvis v. Coes Wrench Co., 117 Mass. 170; Walker v. Railroad, 104 Mich. 606, 611; Busert v. Williams, 51 Mo. App. 13; Dowling v. Allen, 102 Mo. 218; Bromley v. Smith, Beggs & Rankin Machine Co., 12 Mo. App. 594; Gorin v. Railroad, 37 Mo. App. 221; Deeds v. Chicago, B. & O., 137 S. W. 1013; Timmerman v. Frankel, 157 S. W. 1051; Moeller v. Railroad, 133 Mo. App. 68, 75; Seller v. Shoe Co., 130 Mo. App. 723; Miniea v. St. Louis Cooperage Co., 157 S. W. 1006. (2) The form and substance of respondent's first instructions are sustained and warranted by Radtke v. Basket & Box Co., 229 Mo. 1, 16; Burkard v. A. Leschen & Sons Rope Co., 217, 466; Cleveland Rolling Mills Co. v. Carrigan, 46 Ohio St. 283; Metz v. A. Leschen & Sons Rope Co., 158 S. W. 807. (3) Obedience is the primary duty of servant. Stephen v. Railroad, 86 Mo. 221; Brothers v. Carter et al., 52 Mo. 372; Burkard v. A. Leschen & Sons Rope Co., 217 Mo. 466. (4) Where the servant relies upon the assurance of the foreman, in charge of the work and in charge of the servant, and the servant is injured, the master is liable for such injuries. Burkard v. A. Leschen & Sons Rope Co., 217 Mo. 466; O'Brien v. Implement Co., 141 Mo. App. 331; Mueller v. Shoe Co., 109 Mo. App. 506; Bleisner v. Reismeyer Distilling Co., 157 S. W. 980. (5) The court did not err in giving respondent's instruction number 1. An instruction may be so long and deal with so many important matters, as to mislead and confuse the jury as to the issues; but, where the party objecting on appeal does not point out such objections and they do not appear from a careful reading of the instruction, the objection will

be overruled. *Crowl v. American Linseed Co.*, 164 S. W. 618. (6) There was no error in giving instruction number 3 in behalf of respondent. This instruction should be taken and read with respondent's instruction number 1, as well as with all instruction given by the court, whether for the plaintiff or defendant, and if being so read they are consistent and not calculated to mislead the jury, the judgment should be permitted to stand. *Burkard v. A. Leschen & Sons Rope Co.*, 217 Mo. 466; *Hart v. Railroad*, 55 Mo. 476; *Whalen v. Railroad*, 60 Mo. 323; *Haworth v. Railroad*, 94 Mo. App. 215; *Dickson v. Railroad*, 104 Mo. 49; *Czegewgk v. Railroad*, 121 Mo. 201, 215; *Pacjiris v. Hartman*, 190 Mo. 539; *Moore v. Mining Co.*, 105 Mo. App. 709; *Gordon v. Burris*, 53 Mo. 332 (7) Respondent's instruction number 4 was properly given and is authorized by the cases of *Smoot v. Kansas City*, 194 Mo. 513; *Tinkle v. Railroad*, 212 Mo. 445; *Blyston v. Spencer*, 152 Mo. App. 118, which authorize recovery of damages for hospital bill, doctor's bill, etc., not beyond the amount claimed in the petition. (8) And properly allowed for recovery for services until respondent's son became twenty-one years of age and the damages are not excessive. *Schmidt v. Railroad*, 46 Mo. App. 380; *Frick v. Railroad*, 75 Mo. 543; *Keiser v. Transit Co.*, 108 Mo. App. 708; *Mauerman v. Railroad*, 40 Mo. App. 348; *Lang v. Railroad*, 115 Mo. App. 582. (9) Where the allegations in the petition are general, the instructions may submit any particular act of negligence revealed by the evidence. *Hall v. Railroad*, 165 Mo. 114.

ALLEN, J.—Plaintiff brings this action to recover for the loss of the earnings of his minor son resulting from an injury received by the latter while in the employ of the defendant corporation and alleged to have been occasioned by its negligence, and for certain items of expense incurred by plaintiff in and

about the treatment of his son's injury. Plaintiff recovered judgment below in the sum of \$1000, and the defendant appeals.

On March 22, 1910, plaintiff's son, being then a minor about sixteen years and nine months of age, was in the employ of the defendant in the latter's factory, and engaged in operating a machine for "spooling" or winding steel wire upon certain spools or "bobbins." Though plaintiff's son had been in the defendant's employ for some three years, he testified that he "had been working at that particular work about three weeks." The machine which he was operating had three of these bobbins, upon each of which wire was wound from a bundle thereof which had been placed upon an upright roller, termed a "winch." In this operation the wire was directed by certain pulleys or rollers over or under which it ran in passing from the winch to the bobbin.

Plaintiff's son testified that on Saturday, March 19, 1910, one of the wires thus being wound upon a bobbin of this machine became caught under one of the rollers above mentioned. It appears that this wire was held in position by four rollers located between the winch and the bobbin; and, according to the testimony of plaintiff's son, it became caught beneath the second roller from the bobbin. Plaintiff's son stated that prior to this Saturday morning he had always wound small wire on these bobbins; but that this morning, shortly before the accident, he was required to use a larger wire; that the small wire had worn a groove in the roller in question, and that the larger wire became caught in such groove, causing the wire to break. He further testified that when the wire thus became caught and broke, he went to defendant's foreman and told the latter thereof, saying that he "couldn't do a thing with it;" but that the foreman told him that he must splice the wire and proceed with the work. The boy states that he made a further effort to

remove the wire, but did not succeed therein and ran the machine the remainder of the forenoon operating the remaining two bobbins only; that he quit work at noon of that day and did not return to work until the following Tuesday morning, March 22, 1910; that upon returning to work he found the machine in the same condition in which he had left it, and again appealed to the foreman who said: "You must go over there and splice that machine."

Plaintiff's son says that he had not been given any special instructions with respect to the work which he was doing, when he was put at the same, and that the foreman gave him no instructions as to what to do in the emergency in question, nor any warning of danger in the premises, but merely ordered him to remedy the matter himself; that he thereupon took a pair of "pliers," caught hold of the broken wire near the roller under which it was caught, and endeavored to pull it out so that he could braze or weld it, and, after pulling at it for some time, succeeded in getting about a foot and a half thereof from beneath the roller; that he had the wire caught by the pliers about six inches from the roller, with the remaining one foot of the wire "bending a little down," and was standing pulling the wire, with his hands against his stomach, when the pliers slipped from the wire. He says: "I pulled as hard as I could with both hands. The wire was tight. The pliers slipped and I went back about six inches from the position I had been in before that. . . . When this wire slipped the end of it flew over the top of the roller towards the bobbin and then it came back towards me again—it went back just as quick as lightning. It first went back towards the bobbin. . . . After it had gone as far that way as it could it rebounded and came towards me and struck me in the eye."

On behalf of defendant there was testimony of one witness, a young man, to the effect that plaintiff's

son did not receive his injury in pulling a wire from beneath a roller, but in an altogether different manner. There was testimony for defendant to the effect that nothing was found wrong with the machine in question after plaintiff's son was injured, but, on the other hand, defendant's foreman, in testifying as to the condition of the machine after the accident, said: "I saw broken wire there." There was also much testimony adduced by defendant in an effort to show that the accident could not have happened in the manner in which plaintiff's son claims that it did, for the reason that a small wire would not wear a small groove in one of these rollers, but that the groove thus worn would be so large that a larger wire, such as the boy was using, could not become caught therein.

Other pertinent facts will be referred to so far as may be necessary, in the course of the opinion.

I. It is strenuously urged that defendant's demurrer to the evidence should have been sustained. This contention is predicated entirely upon the proposition that it was physically impossible for plaintiff's son to have been injured in the manner in which he claims to have received his injury, and that his version thereof should for this reason be wholly rejected.

It is first said to have been utterly impossible for the wire, under the circumstances related by plaintiff's son, to spring back over the roller which held it and then recoil toward the boy; and that if this were possible, the wire in question could not have reached the boy's eye, as he said it did. But we cannot accede to this. There was ample evidence, if any be needed, to the effect that the steel wire, being then unwound from a coil thereof, was "springy" and likely to fly about when released from a given position. Clearly we could not say that such a wire after slipping from a pair of pliers in the hands of plaintiff's son could not fly back and then rebound toward him. Neither, un-

der the circumstances, could we say that the end of the wire could not reach and pierce the boy's eye, as he said it did; for he states that he had hold of the wire at about six inches from the roller, with about one foot thereof between him and the point at which the wire was held by the pliers. It does not appear just what was the distance from the roller to the boy's eye, and certainly we could not say that it was physically impossible for the foot and a half of wire to reach the eye under the circumstances shown by plaintiff's evidence.

A further insistence is that the wire could not have become caught in the roller in the manner in which plaintiff's son says that it did. It is said to be utterly impossible for a small wire to wear a narrow groove in the roller, so that a larger wire when run over the same roller would become caught therein. This is said to be so particularly because of the fact that this roller and that one nearest the bobbin were both contained in a "frame" which moved somewhat from side to side in order that the wire might be smoothly wound upon the bobbin. And it is said that it would inevitably result from such movements of the frame, and the vibration of the wire due to its rapid motion, that the roller would be worn in such a wide groove as to make it impossible for a wire, such as plaintiff was using, to become fastened therein.

It appears that these rollers or pulleys, when new, have what is termed a V-shaped groove, in which the wire runs and which prevents it from slipping off. That the cast iron rollers wore down from the rapid action of the steel wire over them quite clearly appears from defendant's own evidence. It appears that these rollers revolved from two hundred to three hundred times per minute, and, being of cast iron, wore rather rapidly. Defendant's witnesses differed considerably in their statements, or opinions, as to the usual life of such a roller. However, defendant's superinten-

dent said that they were generally allowed to wear down very near to the outside diameter of the hub, saying: "We never change them until they are worn out."

The distance which the frame, above mentioned, moved back and forth, carrying with it the roller in question and the roller nearest to the bobbin, does not appear. Plaintiff's son testified that these two rollers "move the least bit from one side to another."

We are unable to see how we could say that it was a physical impossibility for the wire to have become caught in the roller, in substantially the way in which plaintiff's son says that it did. With the conflict of the testimony respecting this matter we have naught to do, unless the situation is such that we could and should say that the evidence adduced by plaintiff concerning the manner in which his son was injured is directly and wholly contrary to physical laws and for that reason unworthy of belief. It is quite true that we might reject the testimony of plaintiff's son, as being wholly lacking in probative force, if it were plainly and palpably incompatible with physical laws or undisputed physical facts. But clearly no court should proceed to thus wholly disregard positive testimony, unless the situation is one so plain, simple and clear as to admit of no conclusion other than that such testimony is demonstrated to be utterly false by the physical facts appearing. The rule has been applied in cases where a plaintiff, with good eyesight, declared that he looked for but did not see an approaching train, in broad daylight, which was in fact at the time in his plain, unobstructed view, close at hand, as in *Kelsey v. Railroad Co.*, 129 Mo. 362, 30 S. W. 339; *Schaub v. Railroad*, 133 Mo. App. 444. 113 S. W. 1163, and *Payne v. Railroad*, 136 Mo. 562, 38 S. W. 308, and many other cases; and to many other situations where the testimony was absolutely and wholly refuted by the conceded or uncontroverted physical facts. [See



Nugent v. Milling Co., 131 Mo. 241, 33 S. W. 428; Scroggins v. Street Railway Co., 138 Mo. App. 215, 120 S. W. 731.] Numerous other authorities might be referred to in this connection, but to do so would serve no useful purpose. We take it that no authority may be found for applying such doctrine except to a situation which, upon its face, plainly and clearly demonstrates that the testimony in question cannot be true.

In the instant case we have to deal with a somewhat intricate machine, the construction and operation of which is not made fully clear, in all of its details, by the evidence adduced. It is not contended that we are bound to accept the opinions of defendant's witnesses to the effect that the roller could not have been worn in such manner as to catch and break the wire; but it is contended that the movement of this frame, carrying the two rollers above mentioned, and the vibration of the rapidly moving wire, would necessarily prevent the roller, under any circumstances, from wearing down in a narrow groove, such as would catch and break a wire such as that with which plaintiff's son was working. But we are not prepared to give to this phase of the matter the importance ascribed to it by learned counsel for defendant. It is natural to suppose that the movement of this frame would have some effect upon the wearing of the rollers which it carried; but just what precise effect it must necessarily have had it is impossible for us to say. Plaintiff's son says that the frame moved "the least bit," and if this be true the effect of such movement upon the wearing of the roller might be of small consequence. That a wire broke upon this machine at the time is indicated by testimony of defendant's foreman, as well as by that of plaintiff's son. The roller in question was not preserved, and was not in evidence below. There was nothing, therefore, in the way of positive evidence to show just how this pulley had become worn, beyond the testimony of plaintiff's son. Under

the circumstances we cannot say that that testimony should be rejected.

And if plaintiff's evidence may be accepted as to the manner in which his son was injured, it is not contended that the evidence did not make out a case of negligence on the part of the master. That is to say, if the wire did in fact sink into this roller, and if plaintiff's son, inexperienced in this work, repeatedly sought the aid of the foreman and was each time told that he must get the wire out and splice it, as best he could, without instruction or warning of any sort, it is not argued that this would be insufficient to make a prima-facie case against defendant. And there appears to be no room for such contention.

Upon the whole we think that the demurrer was well ruled.

II. At plaintiff's instance the court gave the following instruction:

"The court instructs the jury that if you find and believe from the evidence that on the 22d day of March, 1910, the plaintiff, Michael Warnke, was the father of Leo Warnke, that on said date, he resided with his said father, and still resides with him, that on said date Leo Warnke was a minor over sixteen and under seventeen years of age and was in the employ of the defendant A. Leschen & Sons Rope Company as a common laborer, and if you further find that one George Keisker was at said time in the employ of the defendant, A. Leschen & Sons Rope Company as a foreman in its factory, and by virtue of his employment and position had immediate control and direction of the plaintiff's said son and others engaged in work in said factory, and had authority to control and direct the work of Leo Warnke, then in that case you are instructed that the said foreman in giving orders to plaintiff's said son and in directing and controlling his work was the vice-principal of defendant, A. Leschen & Sons Rope

Company, and it became and was the duty of the defendant and its foreman, while acting in his capacity, as foreman, to exercise reasonable care in giving orders to plaintiff's son and to exercise reasonable care not to order plaintiff's son to do work that was not reasonably safe; and in case you find and believe from the evidence that the said foreman on the 22nd day of March, 1910, ordered the plaintiff's son to splice the broken wire in question, and you find and believe from the evidence that the pulley in question over which the wire in question passed was defective and out of repair, and if you find and believe from the evidence, that on account of said pulley being defective and out of repair, said wire caught in said pulley and broke, and if you further find from the evidence that in attempting to splice said wire, it sank into and caught in said defective pulley and thereby caused said wire to pull out of the plaintiff's son's grasp or his grasp to pull from said wire and said wire to recoil, strike, and injure his son, and if you find and believe from the evidence it was not reasonably safe work in which to order a boy of his age, judgment and experience to do, and that the defendant's foreman knew, or by the exercise of ordinary care might have known, of the unsafe character of the work of pulling and attempting to splice the wire when caught in the pulley, if you find it was caught, then it was the duty of the foreman to instruct the plaintiff's son, Leo Warnke, in respect thereto, that the plaintiff's son might conduct himself so as to guard against such danger, and if you further find that said foreman neglected to so instruct him and that while plaintiff's son was trying to splice the wire pursuant to the direction of said foreman, if you believe from the evidence said foreman did so direct him, he was injured by reason of the want of reasonable care of the defendant's said foreman, in ordering a boy

of the age of plaintiff's son and experience under the circumstances in evidence, to splice the broken wire in question, by reason of his youth, want of experience and judgment as to the perils of the work of splicing the wire, and that the plaintiff's son did some act in the discharge of his duty as he understood it, such as a boy of his age, judgment and discretion might reasonably have done, which caused the injury and which he did not know to be likely to injure him and had not been properly advised and instructed thereabout by the foreman, plaintiff is entitled to recover."

The first insistence is that this instruction is "drawn in a loose, rambling fashion, does not clearly define the issues," and that the length thereof, and the involved sentences therein contained, were such as to confuse the jury as to the issues on trial. As to this we think that it need only be said that while the instruction appears to be unnecessarily long, somewhat lacking in clearness, and should not by any means be taken as a model, we are not prepared to say that it was such as to mislead or confuse the jury.

The next insistence is that the instruction assumes that the roller or pulley in question was defective. This is predicated upon that part of the instruction wherein it is said: "And if you further find from that evidence that in attempting to splice said wire it sank into and caught in said defective pulley," etc. And it is also said that the instruction assumes that the wire broke. But it is quite apparent that there is no merit in the contention that the instruction assumes these things to be true. The early part of the instruction requires the jury to find "that the pulley in question over which the wire in question passed was defective and out of repair" and "that on account of said pulley being defective and out of repair, said wire caught in said pulley and broke." [See *Bradley v. Railway Co.*, 138 Mo. 293, 39 S. W. 763; *Garard v.*

Coke & Coal Co., 207 Mo. 242, 105 S. W. 767; Pendergrass v. Railway Co., 179 Mo. App. 517, 162 S. W. 712]

It is further urged that the instruction is erroneous in that it is broader than the pleadings and the evidence. It is said that plaintiff's case was bottomed, so far as concerns the condition of the pulley, upon a notch or groove being worn by a small wire so that a larger wire caught therein; while under the instruction the jury could find that the pulley was defective in any particular whatever. But we think that this contention cannot be upheld. The petition alleges that the pulley was "badly worn, out of repair and unfit for use, and the wire in question would sink into and catch therein, thereby causing said wire to break; . . . and that it was dangerous to splice said wire because of the difficulty of putting such broken wire over and under the said defective, out of repair and unfit pulley, over and under which said wire passed in that said wire would sink into and catch in said badly worn, defective and unfit pulley," etc. Plaintiff's evidence is that the pulley was defective on account of a groove worn therein, into which the wire sank and became caught. The instruction requires the jury to find that the pulley was defective and out of repair, and that on account thereof the wire became caught in the pulley and sank into it. While the language of this portion of the instruction is not entirely free from criticism, it appears to require the jury to find the sort of defect in this pulley which plaintiff charged and which was shown by his evidence, viz., a defect such as would permit or cause the wire with which plaintiff was working to sink into the pulley and become fastened. Furthermore, the gravamen of the charge of negligence is the negligent order of the foreman, on the premises, without instructions or warning to plaintiff's son.

The instruction is further assailed upon the ground that it was error to submit to the jury the question of whether or not it was reasonably safe to order plain-

tiff's son to undertake to splice the wire under the circumstances, for the reason that there was no evidence to support this part of the instruction. But clearly the evidence was such as to make this a question for the jury.

It is also urged that there was no evidence whatever tending to show that plaintiff's son needed instruction; and that the instruction in fact did not require the jury to so find, but made it the absolute duty of the defendant to instruct the boy, regardless of whether such was necessary or not. But a reading of the instruction sufficiently disposes of the contention that it does not require the jury to find that instruction was necessary. And the evidence was plainly such as to warrant a finding on the part of the jury that plaintiff's son needed instruction with reference to the doing of the very thing which he claims resulted in his injury, and that he repeatedly appealed to the foreman for such instruction and guidance, but received none.

Plaintiff's second instruction is assailed, but the questions thus raised are either disposed of by what we have said above as to plaintiff's first instruction or do not warrant discussion.

The two instructions given for plaintiff on the question of liability, when read and considered together, we think fairly covered the case, and contained no reversible error—no error, in our belief, materially affecting the merits of the action. [Sec. 2082, Rev. Stat. 1909.]

III. The instruction on the measure of damages is assailed in several particulars; and it is claimed that the verdict is excessive. These two assignments of error may be disposed of together.

The instruction authorized a recovery for doctors' bills, not exceeding \$100; for hospital bill, not exceeding \$25; and for "car fare," not exceeding \$16.20. It

then authorized a recovery of such sum as the jury might believe from the evidence plaintiff would reasonably sustain "by way of loss of services, wages or salary of his said minor son, if any, from the time of his said son's injuries, if any, until he attains the age of twenty-one years of age, and directly caused by his son's injuries, taking into consideration the earning capacity of the boy in his injured condition and deducting that amount from his probable and reasonable gross earnings had he not been injured, and also taking into consideration the possibility of the death of his son, Leo Warnke, that is on the question of his earnings, before his arrival at the age of twenty-one years, not to exceed \$5300."

There is no dispute as to the item of \$100 for doctors' bills. As to the hospital bills, the petition avers a loss of \$25 on this account, while the proof was that the bill was \$24. There is no averment in the petition as to the amount of car fare expended; but plaintiff's testimony is that this item of expense amounted to sixty cents per day for three weeks, a total of \$12.60. It is said that the instruction is erroneous in allowing a recovery on the two last-mentioned items of \$4.60 more than is shown by the proof. But the limit of recovery placed by the instruction upon each of these items is within the pleadings. And we do not think that we ought to assume that a jury of twelve men, presumably intelligent, wholly disregarded the evidence and assessed the limit permitted by the instruction to be assessed upon these items, when the verdict does not in any manner so indicate. We think that no reversible error was committed in this regard (see *Shinn v. Railroad*, 248 Mo. 173, 154 S. W. 103); but the matter will be touched upon later.

It is insisted that it was error for the court to authorize a recovery by plaintiff for the future loss of his son's earnings during the latter's minority, for the reason that there was no evidence tending to show that

at the time of the trial the earning capacity of plaintiff's son was lessened by the loss of his eye, or that any diminution of earning power would result therefrom in the future. And it is claimed that the verdict is excessive by reason of being predicated in part upon such future loss of earnings, as well as on account of excessive allowances on account of the hospital bill and car fare.

It may be said that the evidence does not appear to show a diminished earning power, whereby loss would result to plaintiff beyond the time of the trial below. It does appear that plaintiff lost earnings of his son prior to the trial, resulting from the injury. In this respect a substantial loss was shown, but there appears to be no evidence tending to show that after plaintiff's son had entirely recovered from the effect of the injury and from the operation whereby his injured eye was removed, his earning capacity was diminished by the loss of the eye. But it remains to be seen whether or not the judgment should be reversed on this account.

The evidence discloses that at the time of his injury plaintiff's son was earning eight dollars per week. As to how long he was incapacitated for work on account of his injury the evidence is quite meager. He testified: "I was laid up from this injury six months and more. Since I was injured I have been able to work about nine months, I guess, nine or ten months. I never just kept track of it." He was injured on March 22, 1910, and the cause was tried below on January 28, 1913. The boy says that he was able to work, during the intervening time, but nine or ten months, and that his wages differed at different times; that when he began to work again, at another factory, he earned six dollars per week for the first month, then seven dollars per week, and later twelve dollars per



week. He was earning twelve dollars per week at the time of the trial.

Learned counsel for appellant have furnished us with a computation showing, as claimed, the extent to which plaintiff is entitled to recover, if at all, under the evidence. Figuring the boy's earnings at eight dollars per week, which he was receiving when injured, it is said that had plaintiff's son not been injured he would presumably have earned \$736 from the time of his injury to the time of the trial; that adding to this \$100 for doctors' bills, \$24 for hospital bills, and \$12.60 for car fare expended, the total would be \$872.60. From the last-mentioned amount learned counsel then deduct the amount estimated to have been actually earned by the boy during this period, according to the latter's testimony. This is arrived at by estimating that the boy's average earnings amounted to eight dollars per week for the period of nine months during which he says that he was able to work between the date of the injury and the date of the trial, amounting to a total of \$288. Deducting this sum from \$872.60 leaves \$584.60, which counsel say is "the actual loss sustained by plaintiff on account of his son's injury, including all elements, between the date of injury and the date of trial." It is therefore urged that, if we cannot agree with counsel that the cause should be reversed, appellant is in any event entitled to a remittitur of \$415.50.

But unfortunately for appellant, the foregoing computation is based upon an error vitally affecting the result. In making such computation counsel have taken January 19, 1912, as being the date of the trial below; whereas that was in fact the date of the institution of the suit, and the trial was not had until January 28, 1913, more than a year after the filing of the petition. We think that we may properly adopt the above-mentioned method of arriving at plaintiff's loss prior to the trial below. In doing so, we do not say that the earnings of plaintiff's son after he became able

to work and prior to the trial should be averaged at eight dollars per week, when in fact he was receiving different amounts during different periods of such time, and with no evidence to show for what length of time he received any specific amount. But he was earning eight dollars per week when injured, and as the evidence fails to show that he averaged more than this amount per week for the period during which he was able to work, following the injury, it appears to be proper to base the entire computation upon earnings at eight dollars per week, as counsel have done. So doing, we find that from the date of the injury to the date of the trial, two years, ten months and six days elapsed, amounting to almost exactly one hundred and forty-eight weeks. Plaintiff's son says that during this time he worked about nine months—nine or ten months. Taking this at nine months, as the jury were at liberty to do, and as counsel have done, it amounts to thirty-nine weeks. This deducted from the one hundred and forty-eight weeks elapsing between the date of the injury and the date of the trial, leaves one hundred and nine weeks. Plaintiff's loss, therefore, for this period of one hundred and nine weeks, at eight dollars per week, amounts to \$872. Adding to this the doctors' bills, \$100, hospital bill, \$24 and car fare, \$12.60, we have a total of \$1008.60.

It therefore appears that, adopting this general method of arriving at plaintiff's loss of earnings, and which appears to be well enough, the evidence is such as to sustain a verdict for plaintiff, on account of all items of loss to him, in excess of \$1000, the amount of the verdict and judgment herein. This, of course, includes nothing by way of loss of future earnings, i. e., beyond the date of the trial. It therefore appears that any error in authorizing a recovery on account of such future loss of earnings is harmless, and not reversible error. It does not appear that appellant has been in any respect injured or prejudiced thereby. We do not

regard it, under the circumstances, as error "affecting the substantial rights of the complaining party" (Sec. 1850, Rev. Stat. 1909); nor do we *believe* it to be error "materially affecting the merits of the action." [Sec. 2082, Rev. Stat. 1909. See *Shinn v. Railroad*, *supra*.]

And by the same reasoning, if any error inheres in the instruction on account of the limit of recovery authorized on account of hospital bill and car fare, which we do not say, it is likewise rendered harmless, and not reversible error.

Our conclusion is that the judgment should be affirmed, and it is so ordered. *Reynolds, P. J.*, and *Norton, J.*, concur.

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OSCAR MARTIN, Respondent, v. ARTHUR G,  
PRINTZ, Appellant.

St. Louis Court of Appeals, December 8, 1914.

1. **CONTRACTS: Varying Written Contract: Parol Evidence: Instruments Within Rule.** A receipt for money, which recited that the money was to be invested in a deed of trust, was not a contract within the rule which forbids the contradiction or alteration of a written contract by parol evidence, but was merely a memorandum constituting evidence of the original oral agreement between the parties, whereby it was agreed that the money should be invested in a deed of trust, and was subject to explanation by parol evidence.
2. **STATUTE OF FRAUDS: Agreements Not Within Statute.** A contract under which plaintiff delivered money to defendant, to be invested in a deed of trust, was not one required to be in writing by the Statute of Frauds, since it constituted a mere agreement as to what disposition defendant was to make of plaintiff's money, acting as his agent.
3. **CONTRACTS: Modification of Written Contracts: Parol Evidence.** A contract which the Statute of Frauds does not require to be in writing may be varied or altered, even though it is in writing, by a subsequent parol agreement.

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4. ———: ———: ———. Plaintiff delivered money to defendant, under a contract which provided that defendant should invest the money for plaintiff in a deed of trust, and defendant executed a receipt reciting that the money had been received from plaintiff to be invested in a deed of trust. Defendant having failed to make the investment, plaintiff brought suit for the amount given to defendant, and defendant sought to defend on the ground that the contract had been modified so as to permit him to invest the money for plaintiff in another way, which he had done, but the court excluded the evidence offered in support of this defense. *Held*, that the receipt was not a contract, and that, even if it were, it could have been modified by a subsequent parol agreement, as the Statute of Frauds does not require a contract of this character to be in writing, and hence the court erred in excluding the testimony.
5. **APPELLATE PRACTICE: Conclusiveness of Findings.** In an action at law, tried to the court, where no findings of fact are made and no declarations of law are requested or given, the judgment will be affirmed, unless it is so manifestly erroneous that it cannot be sustained on any theory supported by the evidence, or unless the trial court committed prejudicial error in its rulings.

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen*, Judge.

REVERSED AND REMANDED.

*Koenig & Koenig* for appellant.

(1) The instrument sued on in this case is not a contract. It lacks the elements of a contract and is nothing more than a receipt. A memorandum of a contract which does not purport to be a complete expression of the entire contract is open to explanation by oral evidence. *Hopkins v. Harlin*, 110 Mo. App. 465. (2) Parties may by a subsequent oral agreement change the terms of their written contract, and evidence of such change is admissible. *Cramer v. Nelson*, 128 Mo. App. 393. (3) The rule that all prior and contemporaneous undertakings are merged in the written contract which may not be contradicted by parol evi-

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dence, does not conflict with the rule that obligations of written contract may be waived by conduct of the parties occurring after its execution. *Riley v. Insurance Co.*, 117 Mo. App. 229. (4) An oral contract for the sale of land, which has been completely executed, is not within the Statutes of Frauds, and a written contract may be abrogated by a subsequent verbal agreement entered into between the same parties. See *v. Mallonee*, 107 Mo. App. 721. (5) Plaintiff did not plead the Statute of Frauds in his reply to defendant's answer. And to be available as a defense in a court of record, the Statute of Frauds must be pleaded. *Hackworth v. Zeitinger*, 48 Mo. App. 32; *Bless v. Jenkins*, 129 Mo. 647. (6) Where a contract which the Statute of Frauds requires to be proved by writing has been clearly shown to have been fully performed, the performance takes it out of the operation of the statute. *Maupin v. Railroad*, 171 Mo. 187; *Hall v. Harris*, 145 Mo. 614. (7) It is immaterial that said Printz had no written agreement with said Martin, authorizing defendant to consummate the sale of the real property from Milentz et al. to said Martin, as defendant was acting merely as agent for plaintiff. *Bird v. Blackwell*, 135 Mo. App. 23.

*Wyrick & Eaken* for respondent.

The instrument sued upon was a sufficient writing to bring it within the requirements of a contract. It was a complete expression of the intent of the parties and was not a mere receipt. The contract need be signed only by the party to be charged. *Ivory v. Murphy*, 36 Mo. 534; *Cunningham v. Williams*, 43 Mo. App. 629; *Smith v. Wilson*, 160 Mo. 467. The memorandum must state the contract with reasonable certainty so that its essential terms can be ascertained from the writing itself without resort to parol evidence. *Ringer v. Holtzclaw*, 112 Mo. 519; *Kelly v. Thuey*, 143 Mo. 422.

The note or memorandum must contain the whole agreement. *Rucker v. Harrington*, 52 Mo. App. 481; *Leesly Bros. v. Fruit Co.*, 162 Mo. App. 195.

ALLEN, J.—Plaintiff instituted this action for the recovery of \$1000 alleged to have been received by defendant from plaintiff for the purpose of purchasing for the latter a deed of trust upon property in the city of St. Louis, and for which the defendant executed the following receipt:

“St. Louis, June 3, 1908. Received of Oscar Martin One Thousand and no/100 Dollars, to be placed on first deed of trust 5 per cent loan in Dixie Place, for 3 years.

“1000

ARTHUR G. PRINTZ.”

Plaintiff in his petition avers that defendant failed to so invest the money, and refused to repay the same to plaintiff.

The answer admits the execution of the receipt, but avers that, at plaintiff's instance and request, the money was used by defendant for plaintiff in part payment of the purchase price of a house and lot in the city of St. Louis.

The defendant is a real estate agent in the city of St. Louis; and plaintiff, who is a cousin of the defendant, placed in the latter's hands \$1000 on or about June 3, 1908, for which defendant executed the receipt above set out. Plaintiff's testimony in chief went to show that defendant did not apply the money as agreed, and had ever refused to repay the same to plaintiff. And plaintiff denied that he had given defendant authority to otherwise invest the money.

On behalf of defendant it was sought to show that after the money had been placed in the defendant's hands it was agreed, and plaintiff directed, that it be used in the purchase of a house and lot; that the same was done, and a warranty deed to the property executed to plaintiff on February 1, 1909; and that plain-

tiff, on the last-mentioned date, executed a note for \$1200 and six semi-annual interest notes, together with a deed of trust securing such notes, in order to complete the purchase of such property. Plaintiff, on cross-examination, admitted the execution of the notes, but denied having signed the deed of trust and claimed that if the title to the property was acquired in his name it was done without his knowledge or consent.

Defendant, as a witness in his own behalf, undertook to testify to the alleged subsequent agreement regarding the disposition of the money and plaintiff's directions in the premises, and to introduce in evidence the warranty deed and deed of trust above mentioned. The court, however, sustained objections to the admission of substantially all of the evidence thus sought to be introduced in support of the defense set up by the answer. It is unnecessary to refer to these rulings in detail. It is sufficient to say that the court excluded practically everything offered in support of this defense. The defendant thereupon rested; and, judgment going for plaintiff, defendant has brought the matter here for review.

Respondent's argument appears to be that the receipt constituted a written contract between the parties which could not be varied by parol. But there is clearly no merit in this. The receipt is not a written contract, though as a memorandum it constitutes evidence of the original oral agreement between the parties, subject, however, to explanation by parol testimony. Neither was the contract itself one required to be in writing under the Statute of Frauds, for it constituted a mere agreement as to what disposition the defendant was to make of plaintiff's money, acting as the latter's agent. And had the original contract been in writing, it could be varied or altered by a subsequent parol agreement between the parties.

It is said that plaintiff did not plead, or offer to prove, compliance with the original contract. This is

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quite true; but defendant did plead, and sought to show, that the original agreement had been subsequently modified by the parties, in accordance with which defendant acted in investing plaintiff's money. This, if true, is a complete defense to plaintiff's claim. And the defendant was entitled to introduce the evidence brought forward by him to substantiate this defense, and which tended very strongly to support it. It was plainly error for the court to exclude this evidence.

But respondent urges that, as the case was tried without a jury and no findings of fact were made and no declarations of law requested or given, the judgment should be affirmed, unless it is so manifestly erroneous that it cannot be sustained upon any theory supported by the evidence. This is true, where no reversible error of law intervenes below. Here it is quite clear that reversible error was committed in the exclusion of evidence, whereby a perfectly valid defense sought to be introduced was altogether ruled out of the case and excluded from consideration.

The judgment must be reversed, and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Norton, J.*, concur.

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ALICE LA RUE, Appellant, v. PAUL KEMPF,  
Respondent.

St. Louis Court of Appeals, December 8, 1914.

1. **DIVORCE: Parent and Child: Liability of Father for Support of Child.** In the absence of a provision made for the support of minor children, the father continues primarily liable therefor after divorce, and the mother, having their custody, may ordinarily recover from him for their maintenance, if he fails or refuses to furnish it; but where, in connection with the divorce proceedings, a settlement is made, whereby the father



makes provision for the future support of the minor children, which is accepted by the mother as satisfactory, he is no longer liable, *in an action by her*, for support furnished them by her, whatever liability may otherwise continue to attach to him, growing out of his legal duty to provide for his offspring.

2. ———: ———: ———: **Defenses.** In an action by a divorced wife to recover from her former husband for the support of their minor children, whose custody had been awarded to her, the fact that he had repeatedly offered to take the children himself and support them was no defense to the action; her refusal to permit him to take them not justifying his refusal to provide for their maintenance.
3. **APPELLATE PRACTICE: Harmless Error.** The giving of erroneous instructions and the erroneous admission of evidence is innocuous, where, under the evidence, the court should have directed a verdict for the party in whose favor such errors were committed.
4. **RES ADJUDICATA: Issues Concluded: Action on Same Demand: Action on Different Demand.** There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action, concluding the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.
5. ———: **Rationale of Doctrine.** The doctrine of *res adjudicata* proceeds upon the theory, on the one hand, that it is to the interest of the State that there should be an end to litigation, and, on the other hand, that the individual should not be twice vexed for the same cause.
6. ———: **Matters Determined: Parol Evidence.** Where the record, in a former action, does not show what questions were determined therein, that fact may be shown by extrinsic parol evidence.
7. ———: **Issues Concluded: Facts Stated.** In an action by a divorced wife, who had been awarded the custody of the minor

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children, to recover from her former husband for their maintenance for ten years, defended on the ground that he was released from liability by an agreement entered into in connection with the divorce proceedings, under which he had paid her a sum of money in satisfaction of his liability for their maintenance, and on the ground that, in a former suit by plaintiff to recover for their maintenance for a period of thirteen months, in which defendant pleaded the same agreement as a release, judgment was entered for defendant, *held* that the briefs filed by the attorneys in the former action established that the question of the effect of the agreement in the divorce case was submitted in such action and determined in defendant's favor, and hence plaintiff was estopped, as a matter of law, from maintaining the present action, under the principle that a judgment in a former action is conclusive as to all questions that were actually in issue and adjudicated therein, notwithstanding the cause of action in the subsequent suit is not the identical cause of action that was involved in the former.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

**AFFIRMED.**

*H. C. Whitehill* for appellant.

(1) There can be doubt that under the law of this State a father who obtains a divorce from his wife, or, who is divorced by his wife, is still liable to the mother for necessities, support, education, etc., furnished the children of the marriage, where the decree of the divorce makes no provision for their maintenance, etc., where the custody of such children is left by the decree to the care and nurture of the mother. *Rankin v. Rankin*, 83 Mo. App. 336; *McClosky v. McClosky*, 93 Mo. App. 393; *Meyers v. Meyers*, 91 Mo. App. 151; *Lukowski v. Lukowski*, 108 Mo. App. 204; *Shannon v. Shannon*, 97 Mo. App. 119; *Seely v. Seely*, 116 Mo. App. 362. (2) Error was committed by the court in allowing defendant to testify he was ready, able and willing to take and support the children, which could not possibly be a

good defence or excuse for not providing their mother with the means of their support, or for not reimbursing her for such expense. *McClosky v. McClosky*, 93 Mo. App. 402. (3) The court erred in refusing to declare as a matter of law that the suit mentioned in the evidence and the pleadings as having been instituted by plaintiff against defendant before a justice of the peace, was not *res adjudicata*. 23 Cyc., p. 1178; *Foundry & Machinery Co. v. Mfg. Co.*, 100 Mo. App. 414; *State v. Hollingshead*, 83 Mo. App. 682; *Garland v. Smith*, 164 Mo. 22; 23 Cyc., p. 1166; *Scott v. Black*, 96 Mo. App. 472; *McKenzie v. Donnell*, 208 Mo. 63; *Cromwell v. County of Sac*, 94 U. S. 351; *Baumhoff v. Railroad*, 205 Mo. 248. While it is true a single cause of action cannot be split, yet a single contract, such as the liability of a father for the support of the minor children may give rise to several causes of action. *William v. Kitchen*, 40 Mo. App. 604; *Railroad v. U. S.*, 168 U. S. 48; *Womach v. St. Joe*, 201 Mo. 479; *Baumhoff v. Railroad*, 205 Mo. 248.

*Schnurmacher & Rassieur* for respondent.

(1) It is true that in the absence of provision for the support and maintenance of minor children, the father continues primarily liable therefor after divorce, and the mother, having their custody, may recover the cost of such support and maintenance from him, should he refuse to provide it. *McCloskey v. McCloskey*, 93 Mo. App. 393; *Shannon*, 97 Mo. App. 119; *Lukowski v. Lukowski*, 108 Mo. App. 204. (2) But that rule has no application to the case at bar, because the proof shows that substantial and satisfactory provision was made and a stipulation was placed on file in the divorce proceedings, evidencing that fact. The proof further shows that plaintiff accepted the amount paid her, in satisfaction of any claim she might have against defendant for the sup-

port of the children during minority. *Dixon v. Dixon*, 107 Mo. App. 682. (3) The question of defendant's liability to plaintiff is concluded by a final judgment between the parties, rendered in 1901, involving precisely the same questions now presented. The only difference between the former case and the present is as to dates. The liability sought to be enforced, the ground for it and the defenses interposed, are exactly the same. The period of time covered is the only difference. The former judgment is therefore *res judicata*. *Bigelow on Estoppel* (2 Ed.), 45; *Freeman on Judgments*, sec. 253; 24 Am. & Eng. Enc. Law (2 Ed.), p. 780; *Cromwell v. Sac County*, 94 U. S. 351; *Freeman v. Barnum*, 131 Cal. 386; *Koehler v. Holt Mfg. Co.*, 146 Cal. 335; *Markley v. People*, 171 Ill. 260; *Reynolds v. Mandel*, 175 Ill. 615; s. c., 73 Ill. App. 379; *Marshall v. Clothing Co.*, 184 Ill. 421, s. c., 83 Ill. App. 338; *Rowell v. Smith*, 123 Wis. 510; *Railroad v. Cass County*, 72 Neb. 489; *Danziger v. Williams*, 91 Pa. St. 234; *Merriam v. Whittemore*, 5 Gray, 316. (4) Where a suit is for the identical cause of action as that submitted and determined in a former suit, between the same parties, the judgment in the first suit is a conclusive bar, not only as to every matter which actually was offered or received to sustain or defeat the claim, but as to every other permissible matter which might or could have been offered by either party for that purpose. But where the second suit is upon the same general, but not upon the identical, claim or cause of action, then the former judgment operates as an estoppel only as to those matters, in issue, which were actually litigated and determined. *Dickey v. Heim*, 48 Mo. App. 114, and cases cited under point 3. (5) Where the pleadings and judgment in the former action, offered as a bar, do not disclose the precise point or question litigated and determined, the party seeking to avail himself of the judgment may prove, by extraneous evidence,

the precise point or question in issue and decided. Freeman on Judgments, sec. 273; *Cromwell v. Sac County*, 94 U. S. 353; *Spradling v. Conway*, 51 Mo. 51; *West v. Moser*, 49 Mo. App. 201. (6) As to the conclusiveness of the judgment, it matters not whether the former adjudication was right or wrong in law, or whether, upon the facts, its conclusion was correct or incorrect; such judgment is conclusive between the parties in all subsequent proceedings where the same point is in issue and where the doctrine applies. *Roth Tool Co. v. Spring Co.*, 46 Mo. App. 1. Nor will it even matter that subsequent decisions may have somewhat modified the former adjudication; because, as to the same parties and the same issues, it remains conclusive. *Turnverein v. Hagerman*, 232 Mo. 693.

ALLEN, J.—This is an action whereby plaintiff seeks to recover from her former husband for the support and maintenance of two minor children of plaintiff and defendant, alleged to have been provided by plaintiff during the period from October 1, 1900, to October 1, 1910. The cause was tried before the court and a jury, resulting in a verdict and judgment for the defendant, and the plaintiff appeals.

The petition alleges that the plaintiff and defendant were married in 1896, and lived together as husband and wife until on or about December 24, 1898, during which time there were born of the marriage two children. It is alleged that the defendant abandoned plaintiff and said minor children on or about December 24, 1898, and took up his residence in the State of North Dakota where, on September 1, 1899, he obtained a decree of divorce from plaintiff, by the terms of which decree plaintiff (defendant in the divorce proceeding) was awarded the custody and control of said minor children. And it is averred that from October 1, 1900, to October 1, 1910, the defendant neglected and refused to provide for said minor chil-

dren or either of them, except that he furnished plaintiff approximately \$200 on account thereof; that plaintiff provided for their support and maintenance, the reasonable value thereof being \$50 per month, a total of \$6000. And judgment is prayed for the sum of \$5800.

The answer denies that defendant abandoned plaintiff, or said minor children; but admits that he took up his residence in the State of North Dakota, where he obtained a decree of divorce from plaintiff as alleged by her. The answer further denies that defendant neglected and refused, during the period in question, to provide for said minor children, and avers that he expended certain sums of money for their support during such time. And it is alleged that defendant repeatedly offered to take said children and rear them, but that plaintiff refused to permit him so to do.

The answer further avers that, at the time of the divorce proceedings in North Dakota, defendant paid to plaintiff the sum of \$4500 for the maintenance and support of herself and said minor children, during the latter's minority, which plaintiff accepted and received as and for a suitable and satisfactory provision therefor.

The answer then alleges that, on October 3, 1900, plaintiff instituted against defendant an action before a justice of the peace in the city of St. Louis to recover \$500 for the support and maintenance of said children from September 1, 1899, to October 1, 1900; that in said action judgment was rendered by the justice of the peace in favor of defendant; that plaintiff thereupon prosecuted an appeal to the circuit court of the city of St. Louis, where, upon a trial *de novo*, judgment was again rendered for defendant, from which no appeal was prosecuted. And it is averred that the same identical issues were involved in said former suit as are involved herein; and defendant pleads said

judgment "as a determination and adjudication of the question of his liability to plaintiff for the support of said minor children, and pleads the same as a former adjudication and in bar of this action."

The evidence discloses that plaintiff retained counsel to represent her in said divorce proceedings, and filed an answer therein, which, however, was afterwards withdrawn. It appears that the sum of \$4000 was paid by defendant to counsel representing plaintiff in the North Dakota court—and defendant testified that he permitted plaintiff to retain the proceeds of the sale of certain household furniture amounting to \$500; and that, prior to the hearing of the divorce suit, an agreement was entered into between counsel representing plaintiff and defendant respectively therein, evidenced by a stipulation filed in court, and which the court evidently considered in entering its decree. By this stipulation it was agreed that the charge of adultery made against plaintiff (defendant in said action) would be withdrawn, and that the suit would proceed, if at all, upon other grounds set forth in the complaint; and that plaintiff (defendant there) should have the care and custody of the two children born of the marriage. By the stipulation it was further agreed, "That the plaintiff [defendant here] has made suitable and satisfactory provision for the maintenance and support of the defendant [this plaintiff] and said minor children."

The decree entered in the divorce suit on September 1, 1899, merely grants this defendant a divorce, and awards to this plaintiff the custody and control of said minor children.

On October 1, 1900, plaintiff, who in the meantime had married one La Rue, instituted an action before a justice of the peace in the city of St. Louis to recover the sum of \$500 as for moneys expended by her from September 1, 1899, to October 1, 1900, for the support and maintenance of said minor chil-

dren, as is alleged in the answer. The suit was based upon an account filed. The defendant appeared in the action, and judgment was rendered in his favor. Thereupon plaintiff prosecuted an appeal to the circuit court of said city, where the cause was tried *de novo* before the court without a jury, and at the conclusion of the trial the court gave a declaration of law to the effect that plaintiff could not recover; and, plaintiff not taking a nonsuit, judgment was entered for defendant, from which no appeal was prosecuted.

Plaintiff denied having taken an appeal from the judgment of the justice of the peace, in the former action, and denied that she appeared and testified therein in the circuit court, though the affidavit for appeal appears to have been made by her and the cause was prosecuted to a finality in the circuit court. As there were no pleadings in the former action, and as the judgment entered therein was merely a general judgment for defendant, the record itself does not show what were the questions therein presented and submitted. However, there was parol evidence to the effect that the defense interposed therein was, as here, that the monetary settlement in North Dakota, and the stipulation above referred to, operated to relieve defendant from any liability to plaintiff for the support and maintenance of these children. And briefs filed in the circuit court, in the former suit, by counsel for plaintiff and defendant respectively, were admitted in evidence in the instant case; from which it appears that the above-mentioned defense was the only controverted question in the trial of the former cause.

There is much conflict in the evidence as to what provision the defendant made for his children during the period here in question. Plaintiff's testimony is to the effect that he contributed practically nothing to their support and maintenance. Defendant's testi-



mony, on the other hand, is that he thus expended large sums of money during such period; and the evidence shows that he at least materially contributed to the children's support, and that at the time of the trial below he was making monthly payments to a juvenile court officer for their support and maintenance. And defendant declared that plaintiff was addicted to strong drink, and had squandered therefor moneys given her for the support of the children, which plaintiff denied. It is unnecessary, however, to rehearse in detail the evidence relating to these matters.

It is unnecessary to state fully the many assignments of error before us. They pertain to the giving of instructions at defendant's request, to the refusal to give certain instructions offered by plaintiff, and to the admission and exclusion of evidence. Such thereof as appear to be of consequence will be noticed later

I. It cannot be doubted that, in the absence of a provision made for the support and maintenance of minor children, the father continues primarily liable therefor after divorce; and that the mother, having the care and custody of such children, may ordinarily recover from the father for their support and maintenance should he fail or refuse to furnish the same. [See *Ranken v. Ranken*, 83 Mo. App. 336; *McClosky v. McClosky*, 93 Mo. App. 393, 67 S. W. 669; *Shannon v. Shannon*, 97 Mo. App. 119, 71 S. W. 104; *Lukowski v. Lukowski*, 108 Mo. App. 204, 83 S. W. 274; *White v. White*, 169 Mo. App. 40, 154 S. W. 872.] This, however, is conceded here; the defenses being, (1) that the agreement evidenced by the stipulation above mentioned, and the payment of the said sum of money thereunder, released defendant from liability to plaintiff in the premises; (2) that defendant had nevertheless stood ready and willing to take the children

and support and rear them; and (3) the plea of former adjudication. .

II. Though a father will ordinarily remain liable for the support and maintenance of his children, after divorce, and the law will imply a promise on his part to reimburse the mother therefor, where the latter has the custody of such children and supports and maintains them, nevertheless where, in connection with the divorce proceedings a settlement is made between the parents, whereby provision is made by the father for the future support of the children, which is accepted by the mother as and for a suitable and satisfactory provision therefor, this court has held that the father will no longer be liable *in an action by the mother* for such support and maintenance furnished by her, whatever liability may otherwise continue to attach to the father growing out of his natural and legal duty to provide for his offspring. [See *Dixon v. Dixon*, 107 Mo. App. 682, 82 S. W. 547.] And the ruling appears to be sound.

In the case before us, if the money paid by the defendant to plaintiff's counsel, at the time of the divorce proceeding, was paid under an agreement that the same should constitute a full and satisfactory provision for the future support and maintenance of the children, and was accepted by plaintiff as and for a suitable and satisfactory provision therefor, then it seems clear that plaintiff cannot maintain this action. The stipulation offered in evidence shows upon its face that such was the agreement in the premises, under which the money was paid plaintiff. But plaintiff denied that her attorney was authorized to insert such a provision in the stipulation, and contended that the money was received by her from her former husband as her "interest in his estate," and in no measure for the support of the children. And

the matter was submitted to the jury by instructions for both plaintiff and defendant.

III. We think that no error was committed in refusing instructions offered by plaintiff; and, in the view which we take of the case, it is unnecessary to review such refused instructions. Neither do we perceive any error in the admission or exclusion of evidence, other than with respect to the admission of certain evidence now to be briefly noticed in connection with an instruction given for defendant, of which plaintiff complains.

Defendant was permitted, over plaintiff's objections, to testify, in effect, that he was, and had always been, ready and willing to take the children and support them, and had frequently offered to do this, but that plaintiff would not permit him so to do. And defendant's instruction, above mentioned, told the jury that if they found and believed that defendant had "at all times been ready and willing to maintain, support and provide for such children, but that plaintiff refused to permit him to do so," then their verdict must be for defendant.

The instruction may be well enough in form. That is to say, if the defendant ever sought to provide for the maintenance and support of the children, while they remained in the care and custody of the plaintiff, but was not permitted by her so to do, then doubtless plaintiff could not recover. But there is no such evidence here, so far as we have been able to discover from the record. Defendant's testimony (which was admitted over plaintiff's objections) is that he repeatedly offered to take the children himself and support and rear them. But this constituted no defense to plaintiff's action. Defendant, if not otherwise relieved therefrom, could not escape liability for the support and maintenance of his minor children by offering to take them from the mother who had

been awarded their custody; and her refusal to permit this would afford no justification to him for refusing to provide for their support and maintenance. [See *McCloskey v. McCloskey*, 93 Mo. App. 393, 67 S. W. 669.]

It was error to admit this testimony, and likewise to give the instruction in question, predicated upon such testimony. Such errors would ordinarily be highly prejudicial in a case of this character; but, for reasons which will be made to appear later, we think that they are here not reversible errors.

IV. As to the plea of former adjudication: The court evidently proceeded upon the theory that the judgment in the former suit was conclusive upon plaintiff here, precluding her recovery, if it was determined and adjudicated therein that the defendant was relieved from liability in the premises by reason of the agreement in North Dakota and the payment of the money by defendant thereunder. The matter, however, was referred to the jury by an instruction which directed a verdict for defendant in the event that the jury found that, in said former action, "the same questions were presented and submitted by the plaintiff and defendant as have been presented and submitted in the present cause."

It is earnestly insisted by learned counsel for appellant that the judgment in the former action cannot be invoked here, in bar or as an estoppel, and that the court should have so declared as a matter of law. This is said to be so particularly for the reason that the cause of action is not the same as that sued upon in the former action, and that the proof of the items claimed by appellant in this proceeding, covering the period of ten years in question, was necessarily not the same as that adduced in support of the former demand for support and maintenance of the children for the prior period of thirteen months.

As to the effect of the former judgment, it may be well to refer to certain general principles which should be here borne in mind. There is more or less confusion in the cases relative to the matter of former adjudication; and it is, of course, not possible to reconcile all of the cases, much less the *dicta* to be found therein. However, the principles here involved appear to be clear and firmly established in our jurisprudence.

There is a marked difference between the effect of a former judgment as a bar to the prosecution of a second action upon the same identical claim or demand, and the estoppel arising from the previous adjudication of some question upon which liability hinges in the subsequent suit, where the latter involves a different cause of action. Here it seems quite clear that the former suit between these same parties was not to enforce the same identical cause of action as that now sued upon. There the demand was for a different amount, claimed to be due for an entirely different period of time; and though the same questions may have been involved, affecting the right of recovery, the cause of action was not identically the same as that here sued upon, and the rules to be applied are those which must obtain in such a situation.

In the famous case of *Rex v. The Duchess of Kingston*, 20 How. St. Tr. 538, 2 Smith, Lead. Cas. (8 Ed.), 784, the statement of the law governing the force and effect of judgments and decrees was formulated as follows:

“From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive

jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a (court of) concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

In the leading case of *Cromwell v. County of Sac*, 94 U. S. 351, the rule is stated as follows:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon

such matters is the judgment conclusive in another action."

In Cyc. the rule is thus stated: "The true test is identity of issues. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second if that same point or question as in issue and adjudicated in the first suit, otherwise not. Or, as the rule is otherwise stated, in a second action between the same parties on a demand different from that in the first action, the judgment in the first action is an estoppel only as to the points controverted, on the determination of which the finding or verdict was rendered. And in order that this rule should be applied, it must clearly and positively appear, either from the record itself or by the aid of competent extrinsic evidence, that the precise point or question in issue in the second suit was involved and decided in the first." [See 23 Cyc., p. 1300 et seq.]

In Bigelow on Estoppel, l. c. 45, after the discussion of many interesting cases, it is said:

"The rule in these cases is that a point once adjudicated by a court of competent jurisdiction, however erroneous the adjudication, may be relied upon as an estoppel in any subsequent collateral suit, in the same or any other court, at law, or in chancery, or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it; and this too, whether the subsequent suit is upon the same or a different cause of action. The cases upon this subject are very numerous."

That where the cause of action in the subsequent suit is not the same identical cause of action as that involved in the former, the judgment is nevertheless conclusive as to all questions which were actually in issue and adjudicated in the former proceeding is

abundantly supported by the authorities, both in this State and elsewhere. [See *Garland v. Smith*, 164 Mo. l. c. 22, 64 S. W. 188; *Turnverine v. Hagerman*, 232 Mo. 693, 135 S. W. 42; *Dicky v. Heim*, 48 Mo. App. l. c. 118; *Barkhoefer v. Barkhoefer*, 93 Mo. App. l. c. 381, 382, 67 S. W. 674; *Paving Co. v. Field*, 132 Mo. App. 628, 97 S. W. 179; *Roberts v. Neal*, 137 Mo. App. l. c. 115, 119 S. W. 461; *Hartwig v. Insurance Co.*, 167 Mo. App. l. c. 130, 131, 151 S. W. 477; *Free-man v. Barnum*, 131 Cal. 386; *Koehler v. Mfg. Co.*, 146 Cal. 335; *Markley v. The People*, 171 Ills. 260; *Reynolds v. Mandel*, 175 Ills. 615; *Rowell v. Smith*, 123 Wis. 510; *Freeman on Judgments*, sec. 253; 24 Am. and Eng. Ency. Law (2 Ed.), p. 780.]

In the case before us, though the two suits covered different periods of time, and were hence founded upon different causes of action, nevertheless if in the former suit the question whether defendant was released from liability to plaintiff in the premises, by reason of the previous agreement aforesaid, was submitted, and was adjudicated in defendant's favor, then the judgment resting thereupon must operate as an estoppel here, where the very same matter is drawn in controversy, and upon which liability hinges.

The doctrine of *res adjudicata*, or former adjudication, proceeds upon the theory, on the one hand, that it is to the interest of the State that there should be an end to litigation (*Interest republicae ut sit finis litium*), and, on the other hand, that the individual should not be twice vexed for the same cause (*Nemo debet bis vexari pro eadem causa*). Here the estoppel raised is rather in the nature of estoppel by verdict (see *Markey v. People*, supra, l. c. 263; *Reynolds v. Mandel*, supra, l. c. 618); but the general principle is the same, and so is the result, whatever it may be denominated.

Nor can it be doubted that where, as here, the record in the former suit does not show what questions



were determined therein, this may be shown by extrinsic evidence, though it be by parol. [See *Spradling v. Conway*, 51 Mo. App. 51; *West v. Moser*, 49 Mo. App. 201.]

The trial court left it to the jury to say whether the "same questions were presented and submitted" in the former suit as here. But we have reached the conclusion that the court should have passed thereupon as a matter of law. Relative to the trial of the former cause in the circuit court all of the evidence is that the defense predicated upon the agreement in North Dakota was the only controverted question in the case. This is undisputably shown by the briefs of counsel filed therein, which were properly admitted in evidence here to show what was presented and submitted in the other suit.

In the brief filed therein for plaintiff it is said: "Plaintiff brings this suit to recover money paid by her in support of these children. Defendant contends that the stipulation offered in evidence by him defeats her action." Then follows certain argument and points made, with authorities cited in support thereof.

In the brief filed therein by defendant the latter's counsel concedes defendant's liability for support of his minor children, in spite of the divorce and the awarding of the custody thereof to the plaintiff, unless provision has been made for their support. Reference is then made to the settlement made with plaintiff in North Dakota and to the stipulation in question whereby it was agreed that "suitable and satisfactory provision" had been made for the maintenance and support of plaintiff and said children, which is asserted to be a complete defense.

In these briefs, which constitute the only written evidence as to what was actually adjudicated in said proceeding in the circuit court, there is no suggestion or intimation that any question was involved other than that to which we have referred. And to the

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same effect is the parol testimony adduced. This being so, it appears that the evidence on this question was such as to leave room for no possible conclusion other than that there was presented and submitted in the former suit, and determined in defendant's favor, the chief defense (other than this plea of former adjudication) here pleaded and relied upon. Hence, without saying when, in general, such a question is for the court and when for the jury, we are convinced that the court should here have passed thereupon as a matter of law, and should have declared that plaintiff could not recover in this action, as requested by defendant at the close of the case.

In this view the errors noted above cannot affect the result. Our conclusion is that the judgment should be affirmed; and it is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

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CHARLES P. WONDERLY, Plaintiff in Error, v.  
LOUIS C. HAYNES, Defendant in Error.

St. Louis Court of Appeals, December 8, 1914.

1. **APPELLATE PRACTICE: Motion for New Trial: Pre-requisites to Review.** A bill of exceptions is the sole repository of a motion for a new trial, and unless it is so preserved, the appellate court cannot determine what was prayed for therein.
2. **CIRCUIT COURTS: Presumption of Regularity of Proceedings.** The circuit court is a court of general jurisdiction, and hence every presumption must be indulged in aid of its proceedings.
3. **NEW TRIAL: Effect on Counts Dismissed: Ipso Facto Re-instatement.** The trial court compelled plaintiff to elect on which of two counts in his petition he would proceed. The jury returned a verdict for defendant on the count on which plaintiff elected to stand, and plaintiff took an involuntary nonsuit

as to the other count. Subsequently the court sustained plaintiff's motion for a new trial and set aside the verdict, on the ground that it erred in compelling the election. On a subsequent trial, without the count as to which a nonsuit had been taken being formally reinstated; a verdict was rendered for defendant on both counts. *Held*, that the action of the court in granting a new trial *ipso facto* reinstated said count, and hence the court had jurisdiction to try the issues presented by it notwithstanding it was not formally reinstated by an order of record.

4. ———: **Findings on Several Counts: Issues Retriable.** An order sustaining a motion for a new trial ordinarily leaves the case as though no trial had taken place, except when the petition contains two or more counts and the verdict is for plaintiff on one or more and for defendant on one or more, in which case the granting of a new trial to one of the parties on a count under which the finding was against him does not of itself reopen other counts well tried and decided in his favor.
5. ———: **Scope: Issues Retriable.** An order granting a new trial, unless otherwise limited, will be presumed to award a new trial on all of the issues and to reopen the whole case.

Error to St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

**AFFIRMED.**

*Chisty M. Farrar* for plaintiff in error.

(1) Writs of error lie to correct errors on the face of the record. *State v. Kelly*, 206 Mo. 685; R. S. of Mo. 1909, sec. 2054. (2) Errors apparent upon the face of the record are reviewable by the appellate courts without a bill of exceptions being filed. *Finkelburg & Williams*, Missouri Appellate Practice, p. 45; *Patterson v. Yancey*, 97 Mo. App. 693; *Cartwright v. Liberty*, 205 Mo. 126; *State v. Gardner*, 157 S. W. 84. (3) A nonsuit or judgment of dismissal entered of record deprives the court of further jurisdiction of the case. *Kelly v. Hogan*, 16 Mo. 215; *Davis v. Hall*, 90 Mo. 659; 14 Cyc., p. 421; *Kelly v. Kelly*, 23 Tex.

437; Sere v. McGovern, 65 Cal. 244; Owens v. Crockett (Ga., 1914), 80 S. E. 906; Foster v. Atkinson, 1 Litell's Rep. 214 (11 Ky.); Wright v. Thomas, 6 Texas, 420; Sowle v. U. S., 46 Ct. Cl. 92; Ryan v. Tomlinson, 31 Cal. 11; Tufts v. Bausermann, 46 Ia. 241; New Hampshire Bank v. Ball, 59 Kansas, 55; Hutchins v. Buck, 32 Me. 277; Miller v. Mans, 28 Ind. 194; Lewenthal v. Mississippi Mills, 55 Miss. 101; Johnson v. Shepard, 35 Mich. 115; Connor v. Knott, 10 S. Dak. 384; American Burial Case Co. v. Shaughnessy, 59 Miss. 398; Marsh v. Hammond, 93 Mass. 483; State v. Boehringer, 141 Pac. 126; Cottonwood Creek C. Co. v. Kuehnert, 126 N. Y. S. 904. (4) In a petition consisting of several counts, plaintiff may take a nonsuit as to one and go to trial as to other counts. Grant v. Hathaway, 118 Mo. App. 604.

*Abbott & Edwards for defendant in error.*

(1) Since no bill of exceptions was filed by plaintiff in error, there is nothing for review except the record proper. Scott v. Adams Express Co., 116 Mo. App. 174; Watkins v. Green, 116 Mo. App. 593. (2) Since no exception to the overruling of the motion for new trial can appear in the record proper, and since no bill of exceptions was filed, there is nothing for review except the record proper. Murphy v. Lorrowood, 168 Mo. App. 11; Angel v. Portageville, 168 Mo. App. 16. (3) The record proper is the petition and other pleadings in the case, the summons and officer's return thereon, the verdict, and the judgment of the court. Bombeck v. Bombeck, 17 Mo. App. 26; Bateson v. Clark, 37 Mo. 31; Smith v. Mosely, 137 S. W. 971; Walker v. Fritz, 166 Mo. App. 317. (4) The largest view of what is to be deemed the record proper can make it include no more in addition to what is above stated than those orders which emanate from the breast of the judge while sitting in court, and which are evi-

denced alone by the entries on the minutes of the court. *Green County v. Wilhite*, 35 Mo. App. 39. (5) Motions and the rulings of the court thereon are matters of exception, and do not belong to the record proper. *Crow v. Stevens*, 44 Mo. App. 137; *Sanderson v. Wertz*, 44 Mo. App. 496; *Monroe v. Fipks*, 40 Mo. App. 367; *Jefferson City v. Opel*, 67 Mo. 394; *Kohn v. Lucas*, 17 Mo. App. 29; *Hubbard v. Quisenberry*, 32 Mo. App. 459; *Mocker v. Skellett*, 36 Mo. App. 174; *In re Webster*, 36 Mo. App. 355; *Pearson v. O'Connor*, 151 Mo. App. 169; *Force v. Van Patton*, 149 Mo. 446; 2 Cyc., (1061. (6) A motion to set aside a nonsuit must be preserved in the bill of exceptions. *Harper v. Standard Oil Co.*, 74 Mo. App. 644; *School District v. Holmes*, 35 Mo. App. 487; 2 Cyc. 1062; 2 Cyc. 1073. (7) Whatever part of the proceedings should be incorporated in the bill of exceptions is not made a part of the record by the mere entry of the clerk or by the statement of counsel. 2 Cyc., 1055. (8) The proceedings below will be presumed to be correct unless the contrary appears by the record, and the judgment must stand unless it affirmatively appears that the judgment cannot be justified upon any ground. 1 Missouri Digest, columns 836 and 837. (9) The burden is on the party alleging error to show it affirmatively by the record. 1 Missouri Digest, column 838. (10) Even if the record proper showed that the second count was never formally reinstated nevertheless the parties proceeded in the litigation, taking no notice of the dismissal, and the dismissal was thereby waived. *Munster v. Doyle*, 50 Ill. App. 672; *Phillips v. Hood*, 85 Ill. 450; *Goodrich v. Huntington*, 11 Ill. 646; *Clark v. Montague*, 67 Mass. (1 Gray) 446; 14 Cyc. 426; *Brunswick v. Nix*, 138 Ill. App. 559. (11) Even if the record proper showed that the second count was dismissed and not reinstated, nevertheless plaintiff should not be permitted to profit by his own dereliction.

NORTONI, J.—Plaintiff in error, who is plaintiff also in the case, sued out this writ of error on May 19, 1909, to the end of reversing a judgment in favor of defendant in the case and defendant in error, on both counts of the petition. There is no bill of exceptions before us and the record alone is here.

It appears from the record that plaintiff instituted the suit against defendant by filing his petition in two counts in the circuit court and causing summons to issue thereon. The first count of the petition declared upon a promissory note of \$2500, and the second count declared upon five separate promissory notes, which, it is said, all represented but one cause of action. On November 23, 1909, defendant filed his answer to both counts of the petition, and on November 27, 1909, plaintiff replied thereto. Thereafter, on April 6, 1910, the cause was tried in the circuit court. At the conclusion of the trial, before submitting the issue to the jury, the court sustained defendant's motion to that effect and required plaintiff to elect upon which count of the petition he would further proceed. Upon sustaining this motion, plaintiff elected to stand upon his first count and, thereupon, suffered an involuntary nonsuit as to the second count and dismissed it. The jury returned a verdict in favor of defendant on the first count of the petition, and, thereafter, in due time, plaintiff filed his motion for a new trial, alleging that the court erred in requiring him to elect on which count of the petition he would proceed and thus forcing him to an involuntary nonsuit on the second count.

On May 16, 1910, the court sustained plaintiff's motion for a new trial on the ground above stated—that is, that it erred in requiring plaintiff to elect and forcing him to an involuntary nonsuit on the second count of his petition—set the verdict of the jury in favor of defendant on the first count aside, and ordered a new trial. Thereafter, on May 27, 1910, defendant appealed to this court from such order of the court,

sustaining plaintiff's motion for a new trial, and the order so made was sustained here. In other words, this court affirmed the order of the trial court granting plaintiff a new trial for the error above stated and remanded the cause for further proceedings therein, as will appear by reference to the case between these same parties. [See *Wonderly v. Haynes*, 159 Mo. App. 122, 139 S. W. 813.]

The record before us recites the facts above stated, but omits to disclose that plaintiff filed a motion requesting the court to reinstate the second count of his petition on the docket for trial. However, it appears that the trial of the cause came on a second time in the circuit court on the 19th day of February, 1912, and both parties appeared and contested the same. After hearing the evidence at the second trial, February 19, 1912, it appears the jury returned a verdict in favor of defendant in the trial court and defendant in error here, on both counts of the petition. On this verdict, the court entered a proper judgment in favor of defendant on both counts of the petition.

The point made and pressed upon us here for a reversal of the judgment is, that the court was without jurisdiction to hear and determine the issue arising on the second count of the petition, for it is said this count was never reinstated in the trial court for trial by an order of record to that effect after plaintiff suffered the involuntary nonsuit thereon above referred to and dismissed it. Therefore, it is said that the first count of the petition alone was before the court in the second and last trial, for without a reinstatement of the second count after the involuntary nonsuit, no valid judgment could be given thereon. The argument is an exceedingly technical one, for it appears affirmatively on the face of the record that the issue was tried on both counts of the petition and responded to in the verdict, which expressly states a finding in favor of defendant on both. Moreover, as before stated, the

judgment expressly recites such finding and a judgment in favor of defendant on both counts.

However, it is true the record before us does not affirmatively disclose in so many words that the trial court, on plaintiff's motion, reinstated the second count of the petition for trial at the time it granted the new trial in the cause. But it does appear that plaintiff moved the court for a new trial on the ground that the court erred in requiring him to elect on which count of the petition he would stand and in forcing upon him an involuntary nonsuit as to the second count. It appears, too, affirmatively on the face of the record that the court sustained this motion and set aside the verdict of the jury in the former trial, on the first count, because it had erred in requiring plaintiff to elect on which count of the petition he would proceed and forcing upon him an involuntary nonsuit. The motion on which the court acted with respect to this matter is not part of the record and, of course, is not before us, for the reason there is no bill of exceptions here. The bill of exceptions alone is the proper repository for such a motion, and without it, we are unable to ascertain just what plaintiff prayed for therein. However, the circuit court, being a court of general jurisdiction, every presumption must be indulged in aid of its proceedings to sustain the same as regular and proper, unless facts revealing the contrary appear before us. Therefore, it must be presumed, among other things, that plaintiff incorporated in his motion for a new trial, grounded upon alleged error of the court in requiring him to elect upon which count of his petition he would proceed, a request that the court reinstate the second count of the petition for trial. [Needles v. Burk, 98 Mo. 474, 11 S. W. 1008.] Such appears to be the gravamen of his complaint in the motion for a new trial, and it was on this ground the court sustained



the motion, for the record so recites, and this order was subsequently affirmed here.

Plaintiff in error seems to overlook the effect of an order sustaining a motion for a new trial, which is, generally speaking, to leave the case as though no trial had taken place. [Hurley v. Kennally, 186 Mo. 225, 85 S. W. 357.] There is an exception, of course, when the petition contains two or more counts and the verdict is for plaintiff on one or more and for defendant on one or more. In such case, the granting of a new trial to one of the parties on a count ruled adversely to him does not of itself reopen others well tried and decided in his favor. [See Cramer v. Barmon, 193 Mo. 327, 91 S. W. 1038.] However, it is the rule that an order granting a new trial will be presumed to award a new trial on all of the issues and to reopen the whole case unless there are directions to the contrary. [14 Enc. Pl. & Pr. 936.]

Here, the court expressly recited of record that it granted the new trial because it erred in requiring plaintiff to elect on which count of the petition he would proceed, when it should have sent both counts to the jury. This reveals beyond question that the court receded from its position which had forced plaintiff to an involuntary nonsuit of the second count and granted to him everything that may be presumed in his favor on that motion, and such obviously includes a reinstatement of his cause of action declared upon in the second count for trial.

Other affirmative matters of record make it appear that both counts of the petition were subsequently tried and a verdict and judgment given in express terms for defendant on both such counts. The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

THOMAS N. HOLT, Respondent, v. HAMILTON-  
BROWN SHOE COMPANY, Appellant.

St. Louis Court of Appeals, December 8, 1914.

1. **MASTER AND SERVANT: Injury to Servant: Unguarded Machinery: Sufficiency of Evidence.** In an action by a servant for injuries alleged to have been sustained by reason of defendant's negligence in requiring him to work about an unguarded rip saw, in violation of Sec. 7828, R. S. 1909, *held*, under the evidence, that the question of whether the saw could have been safely and securely guarded, so as to have prevented the injury, was for the jury.
2. **NEGLIGENCE: Contributory Negligence: Question for Jury.** Contributory negligence is for the jury, where the question is one about which reasonable minds may differ.
3. **MASTER AND SERVANT: Injury to Servant: Unguarded Machinery: Contributory Negligence.** In an action by a servant for injuries sustained by reason of his hand coming in contact with an unguarded rip saw, where it was shown that he detached the power and waited the usual time for the saw to stop and in the dim light thought it had done so, whereupon he reached for a strip beyond the saw, and at that instant the electric light diminished so as to render him unable to see, and, in drawing his hand back, it came in contact with the saw, which was still moving, *held* that the question of whether he was guilty of contributory negligence was for the jury.
4. **NEGLIGENCE: "Ordinary Care."** "Ordinary care" is such care as an ordinarily prudent person would be expected to exercise in the circumstances of the case.
5. ———: **Emergency Acts.** The question of whether a person exercised ordinary care is to be considered with reference to the particular circumstances that obtained, and if some change of condition was suddenly thrust upon him, tending to disconcert his senses for the moment, such fact should be considered along with the others, and, in this view, an act which might ordinarily be regarded as negligent as a matter of law would be mitigated or excused, in a measure, so as to make it a question for the jury, if it was occasioned by sudden shock or surprise.
6. **MASTER AND SERVANT: Injury to Servant: Safe Place to Work.** It is the duty of a master to furnish sufficient light

to enable his servant to see while operating dangerous machinery.

7. ———: ———: ———: **Instructions.** In an action by a servant for injuries sustained by reason of his hand coming in contact with an unguarded rip saw, where it was shown that he detached the power and waited the usual time for the saw to stop and in the dim light thought it had done so, whereupon he reached for a strip beyond the saw, and at that instant the electric light diminished so as to render him unable to see, and, in drawing his hand back, it came in contact with the saw, which was still moving, *held* that an instruction for plaintiff, which submitted the matter of defendant's omission of care to furnish adequate light, was not erroneous on the ground that it was not supported by the evidence, merely because plaintiff testified that the light was ample for the task of ripping, where he also testified that, after detaching the power and waiting the usual time for the saw to stop, he did not discern that it was moving because of the poor light.

8. **NEGLIGENCE: Instructions: Submitting Immaterial Facts.** An instruction in a negligence case which correctly submits a theory of negligence justified by the evidence is not to be condemned because it requires a finding of additional facts that are not essential to a recovery.

Appeal from St. Louis City Circuit Court.—*Hon. George C. Hitchcock*, Judge.

**AFFIRMED.**

*Holland, Rutledge & Lashly* for appellant.

(1) The court erred in refusing to give the peremptory instruction asked by appellant at the close of all the testimony—because there was no proof of any facts that establish liability on the part of the appellant. *Bair v. Heibel*, 103 Mo. App. 621; *Czernicke v. Ehrlich*, 212 Mo. 386; *Smith v. Box Co.*, 193 Mo. 715; *Lohmeyer v. Cordage Co.*, 113 S. W. 1108. Because the testimony showed that respondent was guilty of negligence as a matter of law. *Williams v. Railroad*, 165 S. W. Rep. 788; *Maupin v. Miller*, 164 Mo. App. 149; *Doerr v. St. Louis Brewing Assn.*, 176 Mo. 547; *George v. Mfg. Co.*, 159 Mo. 333; *Beymer v. Hammond Packing*

Co., 106 Mo. App. 726; Kelly v. Calumet Woolen Co., 177 Mass. 128; Chicago Packing & Provision Co. v. Rohan, 47 Ill. App. 640; Railroad v. Post, 170 Fed. 943; Kehoe v. Stern, 114 N. Y. Sup. 14; Newport News v. Beaumeister, 104 Va. 744; Jones v. Moran, 45 Wash. 391; Larson v. Knapp, 98 Wis. 178; Bridges v. Gresham, 111 Ga. 814; Weller v. Consolidated Gas Co., 198 N. Y. 98; Trainer v. Mining Co., 243 Mo. 373. (2) The court erred in giving instruction number 2 at the instance of respondent: (a) Because said instruction states generally that it was the duty of appellant to furnish respondent a reasonably safe place in which to work instead of limiting the duty to the specific acts of negligence set out in the petition. Adolph v. Columbia Pretzel B. Co., 100 Mo. App. 199; Feary v. Railroad, 162 Mo. 75; Chitty v. Railroad, 148 Mo. 64; McManamee v. Railroad, 135 Mo. 446; Waldheir v. Railroad, 171 Mo. 314; McCarty v. Hotel Company, 144 Mo. 397. (b) Because said instruction states that it was the duty of appellant under the common law to guard the saw in question, whereas under the common law no such duty exists. Bair v. Heibel, 103 Mo. App. 621; Lohmeyer v. Cordage Co., 113 S. W. 1108; Czernicke v. Ehrlich, 212 Mo. 386; Smith v. Box Co., 193 Mo. 715. (c) Because said instruction predicates recovery upon the alleged negligence on the part of appellant to furnish reasonably adequate light when there was no evidence of any negligence on the part of appellant in this regard. Stone v. Hunt, 114 Mo. 66; State v. Hope, 102 Mo. 410; Evans v. Interstate Co., 106 Mo. 594; State v. Brown, 145 Mo. 680; Wilkerson v. Eilers, 114 Mo. 215; Yarnell v. Railroad, 113 Mo. 570; Waldhier v. Railroad, 89 Mo. 106; Woods v. Campbell, 110 Mo. 572. (d) Because by said instruction the jury were erroneously charged in reference to the defense of contributory negligence. (3) The court erred in giving instruction number 3 at the instance of respondent: (a) Because there was no evidence of

any violation of the statute of the State of Missouri in reference to guarding dangerous machinery. (b) Because the said instruction improperly eliminates the defense of contributory negligence where a violation of the statute is claimed. *Huss v. Heydt Bakery Co.*, 210 Mo. 44. (4) The court erred in refusing to give instruction number 15 offered by appellant. Where there is no evidence to sustain a charge of negligence contained in a petition it is the duty of the court at the instance of the defendant to take such issue from the jury. *Chrismer v. Bell Telephone Co.*, 194 Mo. 189. (5) The court erred in refusing to grant a new trial because the verdict of the jury was excessive.

*Leahy, Saunders & Barth* for respondent.

(1) Concerning the issue of negligence: (a) All of the evidence establishes a violation of the statute of the State of Missouri in reference to guarding dangerous machinery (Sec. 7828, R. S. Mo. 1909). This constitutes negligence *per se*. *Stafford v. Adams*, 113 Mo. App. 717; *Millsap v. Beggs*, 122 Mo. App. 1; *Lore v. American Mfg. Co.*, 160 Mo. 608. Respondent's instruction 3 correctly declared the law with reference to the statutory requirements. Nor was the defense of contributory negligence eliminated. The court gave, at the request of appellant, at least five separate instructions on the issue of contributory negligence, being instructions numbers 6, 7, 8, 10 and 11. (b) In addition, there was evidence of appellant's negligence in failing to exercise reasonable care in furnishing the respondent a reasonably safe place in which to work. Respondent was placed at work in a dark basement and was made to trust to the efficiency of a single incandescent light. *Malkmus v. St. Louis Portland Cement Co.*, 150 Mo. App. 446. Respondent's instruction 2 was also proper. It simply required the jury to find an additional fact of negligence, and as to this appellant

cannot complain. (2) Concerning the issue of contributory negligence: (a) On the question of the respondent's alleged contributory negligence precluding him as a matter of law, every reasonable intendment to be drawn from the evidence offered by him must be indulged in his favor and the evidence introduced in his behalf regarded as absolutely true. "When more than one inference can be fairly drawn from the facts as to his care or want of care, the question of contributory negligence is for the jury." *Shamp v. Lambert*, 142 Mo. App. 567; *Heine v. Railroad*, 144 Mo. App. 443; *Meng v. Railroad*, 108 Mo. App. 553; *Hollweg v. Bell Telephone Co.*, 195 Mo. 149; *Eckhard v. St. Louis Transit Co.*, 190 Mo. 593; *Gratoit v. Railroad*, 116 Mo. 466; *Troll v. Drayage Co.*, 254 Mo. 332. (b) Respondent was injured while under the impulse of a sudden shock or surprise occasioned by the unexpected dimming of the single light furnished him while working at the unguarded saw. This light became dim while respondent was in the very act of reaching over for his strips. It is established law that under such conditions contributory negligence will not be inferred as a matter of law. *Dutzi v. Geisel*, 23 Mo. App. 676; *Carney v. Brewing Association*, 150 Mo. App. 437; *Dean v. Railroad*, 156 Mo. App. 634; *Davidson v. Railroad*, 164 Mo. App. 701; *Jewell v. Manufacturing Co.*, 143 Mo. App. 200; *Dickson v. Railroad*, 124 Mo. 140; 3 *Labatt*, "Master and Servant" (2 Ed.), sec. 1235; *Shearman and Redfield*, "The Law of Negligence" (6 Ed.), secs. 85, 213; *Beach on "Contributory Negligence"* (3 Ed.), sec. 40. The situation is not one where a plaintiff deliberately took the chance of injury. There was no "groping in the dark." The issue of contributory negligence in like cases wherein a plaintiff was put to work on unguarded or dangerous machinery has been left as a question of fact for the jury. *Stafford v. Adams*, 113 Mo. App. 717; *Millsap v. Beggs*, 122 Mo. App. 1; *McGinnis v. Printing Co.*, 122 Mo. App. 227; *Adolff v.*

Columbia Pretzel & Baking Co., 100 Mo. App. 199; Malkmus v. Cement Co., 150 Mo. App. 446; Trent v. Printing Co., 141 Mo. App. 437; Ludwig v. Cooperage Co., 156 Mo. App. 117; Lobban v. Railroad, 159 Mo. App. 464.

NORTONI, J.—This is a suit for damages on account of personal injury received through the negligence of defendant. Plaintiff recovered and defendant prosecutes the appeal.

Plaintiff lost a finger by means of a rip-saw installed in defendant's basement and sues under the statute requiring dangerous machinery to be guarded.

It appears plaintiff was a carpenter in defendant's employ and among other things worked about a rip-saw in the basement. The rip-saw was installed in a table about four feet wide and twelve feet long and propelled by motive power attached. The table and rip-saw stood in the basement of defendant's building, which was more or less dark. It appears that the basement was lighted by two small windows, about forty feet distant from the work table, and one incandescent electric light suspended from the ceiling some three or four feet from the saw. The evidence tends to prove that the light was poor, but plaintiff said it was sufficient to enable him to see when operating the saw. At the time of his injury and immediately before, plaintiff had been using the saw to rip a number of strips and finished that task in so far as the ripping was concerned. Thereupon he pulled the lever through which the power was disconnected and waited for a minute and a half or two minutes for the saw to stop. The saw, it is said, was circular in character and about fourteen inches in diameter. It was installed about the center of the top of the table and as much as five inches of it protruded above the top. When in operation, of course, it revolved rapidly and the evidence is that it usually stopped and became stationary about a

minute or a minute and a half after the power was disconnected. After disconnecting the power, plaintiff says he waited the usual length of time for the saw to stop, looked at it, and, in the dim light, thought it had done so, whereupon he reached beyond to take up from the table the strip which he had ripped off, and at that instant the incandescent light diminished, so as to render him unable to see the saw, and in drawing his hand backward with the strip, it came in contact with the teeth of the saw, still in motion, and severed his finger.

The petition describes the situation of the saw in the basement, the poor light afforded, and proceeds to charge that defendant was negligent in requiring plaintiff to work about the unguarded rip saw in a basement so insufficiently lighted. Of course, the gravamen of the charge pertains to the violation of the statutory duty with respect of such matters, but the insufficient light is interwoven therewith as if to augment the negligent conduct of defendant. The statute declared upon is as follows:

“The belting, shafting, machines, machinery, gearing and drums, in all manufacturing, mechanical and other establishments in this State, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible; if not possible, then notice of its danger shall be conspicuously posted in such establishments.” [Section 7828, R. S. 1909.]

There is an abundance of evidence in the record tending to prove that defendant could have installed a guard, known as a scissor hinge, over the saw, which would have prevented the injury complained of and yet not have interfered with its efficiency as a rip saw. No such guard was installed and, indeed, no guard whatever, for that matter, was provided therefor. It is argued the judgment should be reversed because it is



said defendant may not be regarded as having violated the statute for that the evidence does not affirmatively disclose the saw could have been "safely and securely guarded" so as to have prevented injury whatever. But, obviously, such is a question for the jury. It is said that any guard to be installed about the saw must leave an unguarded space between the table and the guard above it through which the strip of timber on which the ripping is done should pass and so much at least as is unguarded entails some risk of injury. But be this as it may, the evidence is, that the saw could have been sufficiently and securely guarded so as to have prevented the injury in the instant case, and we regard this as sufficient. Of course, if such a guard were installed and it appeared plaintiff tucked his fingers beneath the guard and against the saw, as suggested in the hypotheses advanced in the argument, another question would arise. Suffice to say, no such question appears in the case, and the jury found the fact to be that the saw could have been safely and securely guarded so as to prevent the injury complained of.

But it is argued plaintiff must be declared negligent as a matter of law, for it appears he placed his finger against the teeth of the saw immediately before him. It is true the question concerning this matter is not entirely free from doubt. But if it be one about which reasonable minds may differ, then it is for the jury. [See *Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770.] No one can doubt that the duty devolved upon plaintiff to exercise ordinary care for his own safety while working about the saw, and the question is to be considered with reference to the conduct of an ordinarily prudent man under the same or similar circumstances. It is true plaintiff was familiar with the saw and had operated it frequently before. He admits that he knew it was dangerous and liable to sever a finger permitted to come in contact with it. But he

says, too, the saw always theretofore stopped revolving a minute or a minute and a half after the power was disconnected; that on this occasion, having completed the task of sawing, he pulled the lever, disconnected the power, and waited for a minute and a half or two minutes for the saw to stop. The basement was poorly lighted. The two small windows were some forty feet away and only one incandescent light had been furnished by defendant at the working place. This light, it is said, hung some three or four feet distant from the saw. Plaintiff says, after waiting a minute and a half or two minutes, he looked at the saw to discern if it were still moving, but because of the poor light was led to believe it had stopped, and thereupon immediately reached forward to pick up the strip from the working table. Simultaneously with reaching forward, the glow of the one incandescent light, which was under defendant's control, suddenly diminished so as to envelop the situation in almost complete darkness for an instant and as he drew his hand back with the strip, he came in contact with the saw still revolving. We cannot say, on these facts, as a matter of law, that no ordinarily prudent man would have done likewise under the circumstances.

Although the case is similar to, it is not identical in principle with, *Kelley v. Calumet Woolen Co.*, 177 Mass. 128, for there the plaintiff actually groped in the dark amid dangers which beset the place. In other words, in that case the darkness came upon the scene first, and after the incandescent light had gone out, plaintiff groped with his hands in the dark in an endeavor to reach the shipper, in order to stop the machine with his left hand, and in this wise was injured, through permitting his right hand to come in contact with and be crushed by the quadrant gear. There the machinery was known by the injured party to be in operation and moving at full blast. Upon the going out of the light, he voluntarily put forward his hand

in a place of known danger and received his injury. Here the situation was different. The light was normal but dim, at the time plaintiff looked at the saw after waiting a sufficient period for it to stop, and, as he says, it appeared to be motionless. Ordinary care would require him to wait a sufficient length of time for the saw to stop and this he says he did, according to the usual course. The light was dim, though normal, at the time—that is, such light as had prevailed all the while—and with its aid plaintiff appears to have made such an observation as an ordinarily prudent person might, in the circumstances which prevailed. It is true the saw had not entirely stopped at the time, but it appeared to him as though it had, and thereupon he put forward his hand to pick up the strip beyond it. Simultaneously with this movement, the incandescent light flickered out and he withdrew his hand with the strip, but in the darkness of the instant brought his finger in contact with the moving saw.

There is a principle in the law of negligence, available to plaintiff here, which proceeds to alleviate the consequences of one's conduct under the stress of shock or surprise produced by the act of defendant at the time. At most one may not be held to account for more than ordinary care and that is such care as an ordinarily prudent person would be expected to exercise in the circumstances of the case. Such care and the conduct of a party in judgment is to be considered with reference to the particular circumstances which obtain at the time, and if it appear that some change of conditions is suddenly thrust upon him tending to disconcert the senses for the moment, it is competent to reckon with this fact along with the others. In this view, an act which might ordinarily be regarded negligent as a conclusion of law is frequently mitigated or excused in a measure so as to render it a matter for the jury, if it appears to have been occasioned under sudden shock or surprise. [See *Dutzi v. Geisel*,

23 Mo. App. 676.] Here the light suddenly went out simultaneously with plaintiff's reach for the strip, and no doubt this fact tended to disconcert him for the time, so as to remove the possibility of deliberation on the best course to pursue. Having advanced his hand to take up the strip, he did so in the dark, and withdrew it, to the hurt complained of. No doubt, as counsel has well said, the injury came because, forsooth, the body could not respond as quickly as the senses could perceive. We believe the question of plaintiff's contributory negligence was one for the jury.

Plaintiff's second instruction submits the case to the jury as for a violation of the statute and treats conjunctively therewith the matter of insufficient light in the basement. The theory of the instruction is, that defendant was remiss in its duty not only in failing to guard the saw but in furnishing plaintiff such unguarded saw with which to work in the poorly lighted basement. The jury were directed thereby, and a verdict for plaintiff was authorized, if he could not, by the exercise of "ordinary care at the time, see that said saw was still revolving, and further believed from the evidence that the defendant failed to use ordinary care to safely and securely guard said saw, and failed to use ordinary care to furnish reasonably adequate light in the place in which said saw was located." It is said that so much of the instruction as submits the matter of defendant's omission of care to furnish an adequate light is erroneous because plaintiff testified as he did that the light, though poor, was sufficient for him to perform the task of ripping the strips. It is argued that this portion of the instruction is not supported by the evidence because plaintiff so testified. But we are not persuaded the judgment should be reversed because of this, for though plaintiff testified as above stated, he testified, too, that upon looking at the saw, after waiting a minute and a half or two minutes for it to stop, he did not discern it was moving, because of the

insufficient light. The matter of the sudden diminishing of the light at the time of the injury counts more particularly on the question of contributory negligence and is not to be considered here for the reason it does not appear such occurred through defendant's fault. But no one can doubt that the obligation of ordinary care resting on defendant required it to furnish an adequate light to enable plaintiff to see while operating the saw in ripping the strips and until it had ceased its motion after the power was detached, and this, too, independent of and apart from the sudden diminishing of the light which presently occurred. It may be that, while he was bended over the table feeding the saw in the usual fashion, the light was ample for the task, but when the ripping process was completed and he stood erect beside the table, as the saw gradually lessened its speed, it would seem the obligation to furnish adequate light continued so that he might see whether it stopped or not. As to this feature of the case, the evidence, apart from that concerning the sudden darkness, amply supports the instruction and we regard it well enough. However, the finding with respect to the light at that time is by the conjunction "and" required in addition to the finding of facts under the statute which affixes liability on defendant. At most such matter complained of is but the finding of an additional fact of negligence in conjunction with the liability on the statute and not as a separate predicate of liability entirely. This being true, defendant may not complain.

There are other questions suggested in the brief, but we do not regard them as possessing sufficient merit to warrant discussion in the opinion. The arguments concerning them have been considered and are overruled.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J., and Allen, J., concur.*

CORBY SUPPLY COMPANY, Respondent, v. JOHN  
W. THOMPSON, Appellant.

St. Louis Court of Appeals, December 8, 1914.

1. **SALES: Delivery to Carrier.** Where goods are sold f. o. b. cars at point of shipment, a delivery to the carrier selected by the vendee to receive them is a delivery to the agent of the vendee.
2. ———: ———: **Bill of Lading.** A bill of lading represents the goods for which it is given, and its delivery passes the title as effectually as would an actual delivery of the goods.
3. ———: ———: ———. Where goods, which had been sold f. o. b. cars at point of shipment, were delivered to the carrier selected by the vendee, after the time for making the shipment had expired, an acceptance of the bill of lading for the goods by the vendee, with full knowledge of the delay, operated as an acceptance of the goods, then in the possession of the carrier as his agent, and prevented his rescinding the sale on account of the delay.
4. ———: **Delay in Delivery: Remedies of Vendee.** Where time of performance is made an essential element of a contract of sale, it is regarded as being in the nature of a warranty that the goods will be delivered within the time stipulated, and in case of failure to so deliver, the vendee has the option, either to rescind the contract and refuse to accept the goods, or to receive them and recover from the vendor the damages sustained on account of the delay.

Appeal from St. Louis City Circuit Court.—*Hon.*  
*W. B. Homer*, Judge.

**AFFIRMED.**

*Marshall & Henderson* for appellant.

*Davis Biggs* for respondent.

(1) The fact that the defendant unloaded the pipe and took same into his possession when it arrived at its destination, and when the defendant had full

knowledge of the delay, if any, in the delivery to the railroad and the delay in shipment, constituted a complete acceptance of the pipe, even conceding that plaintiff was in default in making shipment. And under the law of this State there only remained to the defendant the right to recoup by counterclaim for any damage he may have suffered by the delay. *Wall v. Ice & Cold Storage Co.*, 112 Mo. App. 659; *Johnson v. Baltimore Glass Co.*, 7 L. R. A. (N. S.) 1115. (2) The delivery of the bill of lading was a delivery of the goods themselves and transferred title to the defendant. *Scharff v. Meyer*, 133 Mo. 428; *Railroad v. McLiney*, 32 Mo. App. 166; *Zinc Company v. Lead Co.*, 102 Mo. App. 158; *Benjamin on Sales*, sec. 813. (3) If defendant wished to rescind it was incumbent upon him to surrender to plaintiff the bills of lading. *Kessler v. Perrong*, 22 Pa. Sup. Ct. 579; *Kilpatrick v. Kansas City*, 86 Mo. 341. (4) If the defendant desired to rescind on account of the delay in delivery, it was incumbent upon him to exercise his right within a reasonable time, and his failure to object to the delay in shipment when he had knowledge of such delay constituted a waiver of his right to rescind. 35 Cyc. 184; *Lefforts v. Wells*, 167 Mass. 531; *Mecham on Sales*, 1368. (5) The words "immediate shipment" as used in the letter of the plaintiff confirming the order, means within a reasonable time, having due regard to the nature and circumstances of the case. *Fidelity & Deposit Co. v. Courtney*, 103 Fed. 599; *McFarland v. Association*, 124 Mo. 204; *Bowser v. Atkinson*, 161 Mo. App. 456; *Smith Co. v. Langer*, 46 Atl. 623; *Wardall v. Horne*, 81 N. W. 591. (6) The acceptance of the bill of lading and the retention of same after the taking of the goods from the railroad is a sufficient delivery to overcome the defense of the Statute of Frauds. If not, the letter of defendant to plaintiff, being Exhibit "E," in which the defendant sets out the terms of the agreement, was a suffi-

cient memoranda required by the statute. *Cash v. Clark*, 61 Mo. App. 636; *Cunningham v. Williams*, 43 Mo. App. 629; *Moore v. Moundcastle*, 61 Mo. 426; *Harrison v. Craven*, 188 Mo. 609.

NORTON, J.—This is a suit for the purchase price of certain metallic pipe sold by plaintiff to defendant. The finding and judgment were for plaintiff and defendant prosecutes the appeal. A jury was waived and a trial had before the court.

It appears plaintiff is engaged in the railway supply business in the city of St. Louis, and the metal pipe involved here was furnished on his account by the American Spiral Pipe Works of Chicago, Illinois. Defendant desired the pipe to be used at Glynn, Louisiana, and interviewed plaintiff thereabout on December 26. The evidence tends to prove that plaintiff sold defendant the 500 feet of eighteen-inch metal pipe in thirty-foot lengths on terms of immediate delivery f. o. b. Chicago, to be shipped to Glynn, Louisiana, for the price of \$750. The pipe was not promptly shipped, and defendant kept after plaintiff thereabout, while plaintiff urged the American Spiral Pipe Works of Chicago by telegram and telephone, until it was finally loaded on cars on the Chicago Belt Railway on January 5. However, this is conceded not to have been a delivery to defendant, for it seems the agreement contemplated the Illinois Central Railroad Company as the initial carrier, and the pipe was not delivered to that company until January 7.

On the morning of January 7, plaintiff delivered a bill of lading for the pipe to defendant, duly signed by the agent of the Illinois Central Railroad Company. This bill of lading was dated Chicago, January 5, and stamped in red ink on its face was the following: "It is expressly understood and agreed that this bill of



lading is issued at the request of and for the convenience of the shipper, and that said freight has not yet been received by this Railroad Company and that no obligation in respect to said freight is assumed by this Railroad Company, nor shall this bill of lading be in force until said freight is received by this Railroad Company." However, no objection was made on the part of defendant to the fact that the pipe was not delivered to the Chicago Belt Railway Company until January 5 and the only objection interposed to the bill of lading was that it failed to recite the rate of freight to be fifty-eight cents per hundred pounds. This objection being raised against it, plaintiff returned the bill of lading to the American Spiral Pipe Works of Chicago and requested the insertion of the freight rate at fifty-eight cents. A few days thereafter the bill of lading was returned to plaintiff, but with the freight rate of eighty-three cents specified therein, for it appears such was the rate, and on the eleventh of January plaintiff delivered the bill of lading a second time to defendant, with an explanation concerning the rate. Defendant thereupon accepted the bill of lading so delivered to it on January 11 and it appears retained it throughout—that is, it was never returned nor tendered to plaintiff thereafter.

By a stipulation in the record it is agreed that the pipe was actually delivered on the car of the Illinois Central Railroad Company at Chicago on January 7, though the bill of lading was dated two days before, while it was in the custody of the Chicago Belt Railway Company. It appears that considerable delay in the shipment occurred after delivery of the pipe to the Illinois Central Railroad Company, for it did not pass through East St. Louis en route to Louisiana until January 16. On January 16 defendant learned that the pipe had passed through East St. Louis on that day and thereupon notified plaintiff

that he proposed to rescind the contract and reject the goods on account of the delay. Plaintiff declined to accede to this and insisted that he made the delivery to defendant without objection whatever thereabout on his part. Defendant proceeded and purchased pipe elsewhere and on the arrival of the consignment involved here in Louisiana, he refused to receive it, but thereafter, in order to save demurrage and diminish the damage, he unloaded and stored the pipe in Louisiana, but placed it at plaintiff's disposal. Plaintiff declined to further treat with the pipe as its property and insisted that defendant should pay the price therefor.

In his answer, defendant pleads a rescission of the sale and rejection of the goods because of plaintiff's failure to deliver the pipe on the cars of the Illinois Central Railroad Company at Chicago immediately as it agreed, and for a further defense interposed a cross-bill or counterclaim for damages, but it seems the cross-bill was wholly abandoned at the trial, for no evidence whatever was introduced tending to prove the amount of damages, if any, defendant suffered.

On scrutinizing the record, it appears the court found the issue for plaintiff on the theory that, though plaintiff had breached its contract for immediate delivery, defendant had nevertheless waived the breach and its right of rescission on that ground through accepting and retaining the goods and the bill of lading therefor without objection, and rejected the counterclaim for damages because no proof whatever was made with respect thereto.

On the facts in the record the judgment appears to be a proper one, for no one can doubt delivery of the pipe to the Illinois Central Railroad Company at Chicago on January 7 was a delivery to defendant, if accepted by him. The contract of purchase called for a delivery f. o. b. Chicago and the Illinois Central

Railroad Company is conceded to have been the initial carrier selected by defendant to receive the goods. Such being true, the delivery on January 7 to the Illinois Central Railroad Company was a delivery to defendant's agent. [See *Scharff v. Meyer*, 133 Mo. 428, 34 S. W. 858.] Even if such delivery to the agent railroad company was late, it will suffice, if defendant subsequently ratified the act, as he did, through thereafter accepting the bill of lading. Though it be true, as argued, that the delivery of the bill of lading, of date January 5, to defendant on January 7, which recited, among other things, that the Illinois Central Railroad Company had not yet received physical possession of the goods, did not constitute a complete vesting of the title in defendant and a delivery to him, for the reason the goods were then in possession of the Chicago Belt Railway Company and not on the cars of the initial carrier—the Illinois Central Railroad Company—stipulated for, the subsequent delivery and acceptance of the bill of lading to defendant on January 11 certainly concluded that matter, for then, according to the stipulation in the record, the pipe was in the custody of the Illinois Central Railroad Company on its car and had been for four days theretofore—that is, since January 7. The agreed statement or stipulation of facts sets that matter at rest beyond question. On January 11 defendant received and accepted the bill of lading for the goods which were then, and had been since January 7, in possession of defendant's agent, the Illinois Central Railroad Company. No one can doubt that the delivery and acceptance of the bill of lading in such circumstances amounts to a delivery and acceptance of the goods. A bill of lading represents the goods for which it is given and its delivery passes the title as effectually as an actual delivery of the goods. [*Smelting Co. v. Lead Works*, 102 Mo. App.

158, 76 S. W. 668; Scharff v. Meyer, 133 Mo. 428, 34 S. W. 858; Benjamin on Sales (6 Ed.), sec. 813.]

Without objection whatever, defendant accepted the bill of lading on January 11 with full knowledge of the delay then accrued. Obviously such is to be regarded as an acceptance of the goods then in possession of its agent. Having thus accepted the goods and retained the *indicia* of title—that is, the bill of lading—throughout, it was certainly competent for the court to find, as it did, that defendant elected to waive his right to rescind and affirmed the sale. [See Kessler v. Perrong, 22 Pa. Sup. Ct. 578.] The rule is, that when time of performance is made an essential element of the contract of sale, such stipulation is regarded as being in the nature of a warranty that the goods will be delivered in the time agreed, and in case of failure of the vendor to so deliver, the vendee has the option either to rescind the contract and to refuse to accept the goods or to receive them and recover from the vendor his damages. [See Wall v. Ice & Coal Co., 112 Mo. App. 659, 87 S. W. 574; Redlands Orange, etc. Ass'n v. Gorman, 161 Mo. 203, 61 S. W. 820.] Here, though it appears defendant waived his right of rescission and accepted the goods, no one can doubt that it was competent for him to counterclaim for damages under the rule above stated, because of plaintiff's breach. But, as before said, no evidence whatever was introduced tending to prove damages, if any, accruing to defendant on that account. Obviously then the court did not err in denying the right of recovery on the counterclaim.

What has been said sufficiently disposes of all of the questions raised in the case and it is unnecessary to take up the instructions and discuss them separately. The judgment should be affirmed. It is so ordered *Reynolds, P. J.*, and *Allen, J.*, concur.

## GEORGE E. MAYGER, Appellant, v. JOHN R. S. NICHOLS, Respondent.

St. Louis Court of Appeals, December 8, 1914.

1. **CORPORATIONS: Liability for Tort of Officers: Conversion.**  
In order to render a corporation liable for the tort of its secretary in converting shares of its capital stock, the certificates of which were sent to him to be transferred, it must be shown that the secretary, in converting the stock, was acting for the corporation.
2. **RES ADJUDICATA: Persons Concluded: Master and Servant.**  
Where the subject of the litigation does not concern the employment or the relation of master and servant, there is no privity between the master and the servant, and hence a judgment in favor of the master is not available to the servant as the basis of a plea of *res adjudicata*, in an action subsequently brought against him.
3. ———: ———: ———. A judgment in favor of a corporation, in an action for the conversion by its secretary of shares of its capital stock, the certificates of which were sent to him to be transferred, was not a bar, under the doctrine of *res adjudicata*, to the maintenance of an action for the conversion against the secretary as an individual.

Appeal from St. Louis City Circuit Court.—*Hon.*  
*William M. Kinsey*, Judge.

AFFIRMED.

*Frank Y. Gladney* for appellant.

The court erred in failing to sustain the plea of former adjudication, and in sustaining the demurrer thereto and awarding judgment for defendant. *McGinnis v. Railroad*, 200 Mo. 347; *Anderson v. Railroad*, 200 Ill. 329; *Emery v. Fowler*, 39 Maine, 326; *Lippman v. Campbell*, 40 Mo. App. 564.

*Campbell Allison* for respondent.

(1) "Parties" are all persons having a right to control the proceedings to make defense to adduce or examine witnesses or appeals. *Henry v. Wood*, 77 Mo. 277; *Strong v. Phoenix Sur. Co.*, 62 Mo. 289. (2) If the previous action was between different parties, the judgment will not be a bar. *Block v. Dorman*, 51 Mo. 31; *State ex rel. v. Bruneck*, 134 Mo. 592. (3) If in a suit by different plaintiffs against the same defendants, even as to the same general subject-matter, the former judgment is not a bar. *McGill v. Wallace*, 22 Mo. App. 675; *Lobner v. Hassinbusch*, 56 Mo. App. 591. (4) If to sustain the second action different proofs are required to sustain the first, the former is not a bar to the latter. *Garland v. Smith*, 164 Mo. 1; *Springfield v. Plummer*, 89 Mo. App. 515.

NORTONI, J.—This is an action in trover as for conversion. The court sustained a demurrer to plaintiff's reply to defendant's counterclaim and plaintiff appeals from that judgment.

Plaintiff sued defendant as for the conversion of 430 shares of stock in the St. Louis Mining & Milling Company of Montana, said to be owned by him. Among other things, defendant answered by setting up a counterclaim to the effect that plaintiff converted to his own use seventy shares of stock in the same corporation owned by him. In reply to this counterclaim, plaintiff pleaded as a bar to the right of recovery for the seventy shares of stock, a former adjudication in a suit wherein the present defendant was plaintiff and the St. Louis Mining & Milling Company of Montana was defendant. The court sustained a demurrer to this reply, in the view that the subject-matter of defendant's counterclaim is not *res adjudicata*, because of the former suit between defendant as plaintiff and the corporation as defendant.

It appears that plaintiff is the secreary of the St. Louis Mining & Milling Company of Montana and defendant was an agent engaged in selling stock for that corporation. Defendant insists that the 500 shares of stock—the conversion of 430 of which is declared upon in plaintiff's petition, and the conversion of the seventy shares of which is declared upon in defendant's counterclaim—were given to him by the corporation as a bonus. On the other hand, plaintiff insists the 500 shares of stock belonged to him and that he merely loaned them to defendant for a purpose. At any rate, it appears defendant mailed seventy of the shares of stock to plaintiff as secretary of the Mining Company, with the request to cause them to be transferred on the books, and plaintiff retained them as his own. Thereafter, defendant, as plaintiff, sued the St. Louis Mining & Milling Company in conversion for the value of the seventy shares of stock, alleging that the corporation had converted them through the act of its secretary, Mayger, plaintiff here. On a trial of this issue, the finding and judgment were for the corporation. Subsequently, plaintiff, Mayger, secretary of the corporation, instituted this suit against defendant as for the conversion of the remaining 430 shares of stock, and thereupon defendant in his answer counterclaimed against plaintiff as for the conversion of the seventy shares of stock before mentioned, which were involved as the subject-matter of his former suit against the corporation. The judgment having been for the defendant corporation in the former suit with respect to these shares of stock, plaintiff pleads it in his reply to defendant's counterclaim as *res adjudicata* of the subject-matter here.

So much of plaintiff's reply to defendant's counterclaim as is necessary to look to in disposing of the question presented by the appeal is as follows:

“The St. Louis Mining and Milling Company of Montana mentioned in the counterclaim of the cause herein, is the same corporation that was a party defendant to the former proceeding just described; that the seventy shares of stock mentioned in said counterclaim are the same shares of stock involved in the former proceeding; that the certificate No. 760 is the same as that described in the former proceeding; and that the acts and deeds set out in said counterclaim as a cause of action against this plaintiff are the same acts and deeds of which the said J. R. S. Nichols complained in the former proceeding. That in said former proceeding, the said J. R. S. Nichols offered and introduced evidence to prove that the plaintiff herein, George E. Mayger, was Secretary and agent of the St. Louis Mining and Milling Company of Montana, and that as such officer and agent, he converted to his own use, the said certificate of stock referred to as No. 760, both in the former proceeding and in said counterclaim; that in said former proceeding, the said J. R. S. Nichols did not prove or attempt or offer to prove that said corporation had converted said stock in any other manner or by any other means than through and by the acts of its Secretary, who was the present plaintiff, George E. Mayger.”

The court sustained defendant's demurrer to this reply, in the view that, though a judgment had been given for the defendant corporation in the former suit, it did not conclude the matter in favor of plaintiff Mayger, as he may have, even though secretary of the corporation, converted the stock individually. It is argued this was error, for it is said, since the wrongdoing of the corporation was alleged to be exclusively an imputed wrong of Mayger, acting as secretary, the judgment for the corporation in the former suit necessarily implies that there was no wrongdoing on the part of Mayger. We are unwilling to accede to this view, for it may be that Mayger,



plaintiff, individually converted the seventy shares of stock to his own use, so as to entail no obligation whatever on the corporation of which he was secretary, to respond. If such be true, the cause of action is not identical in the two cases, for in the former case the alleged tort was that of the corporation and in this one the tort is that of the secretary, Mayger, unless the case reveals the essential privity which renders the act of Mayger that of the corporation.

It is conceded that Mayger, the secretary of the corporation, who is plaintiff here, was not a party to the former suit against the corporation, and this being true, the judgment in favor of the company of which he is secretary could inure to his benefit only through the doctrine of *respondeat superior*, affording the privity. The case is not one where it is clear the agent was acting within the scope of his authority for the master corporation, for, because of the tort involved, the implication of law excludes that view. In order to have rendered the corporation liable for the tort of its secretary in converting the stock, something more than the mere relation of corporation and officer must appear—that is to say, something tending to show that plaintiff Mayger was acting for the company. In such circumstances alone would the tort of Mayger be the tort of his principal, the corporation of which he was secretary. On the other hand, if Mayger, the secretary of the company, as an individual, converted the seventy shares of stock to his own use, aside from his employment and without authority or ratification on the part of the company, he alone should respond therefor.

The mere fact that plaintiff was secretary of the company does not render him a privy to the judgment acquitting the corporation of a tort committed by him outside of the line of his authority and apart from his employment. It is certain that there is no privity between master and servant where the subject of the

litigation does not concern the employment, or the relation of employer and employee is not a feature of the subject-matter in controversy. [See 23 Cyc. 1265.] The principle of *respondeat superior* is beside the case, for it does not appear that Mayger was acting for and with the authority of the corporation at the time he is alleged to have converted the stock for which the company was acquitted of fault in the former judgment. If plaintiff converted the seventy shares of stock, acting for himself, and without authority from the company, he is, of course, liable to respond in this suit therefor.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

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JUSTUS W. JOHNSON, Appellant, v. WADE H. BUSH, Respondent.

St. Louis Court of Appeals, December 8, 1914.

1. **LIBEL AND SLANDER: Slander Per Se.** A charge that a person is a thief is slanderous *per se*.
2. ———: **Pleading: Petition.** In view of Sec. 1837, R. S. 1909, it is not necessary, in an action for slander, that the petition set out the names of the persons in whose presence the slanderous words were uttered, or that they were understood by those present.
3. ———: ———: ———. A petition, in an action for slander, which alleges that, on a certain date named and in a certain city named, defendant spoke certain slanderous words of and concerning plaintiff, is sufficiently definite and certain as to the place where the words were spoken.
4. ———: ———: ———. In view of Secs. 1818 and 1837, R. S. 1909, a petition, in an action for slander, which sets out the slanderous words and alleges that they were spoken at a named time and place, cannot be required to be made more definite and certain by setting out the circumstances under which defendant spoke them.

5. **PLEADING: Pleading Evidence.** In view of Sec. 1818, R. S. 1909, it is error to require a petition to be made more definite and certain by setting out matters of evidence.

Appeal from St. Louis City Circuit Court.—*Hon. George C. Hitchcock*, Judge.

REVERSED AND REMANDED.

*George W. Wadlow* and *John A. Blevins* for appellant.

(1) Defendant's motion to make the amended petition more definite and certain should have been overruled. Sec. 1837, R. S. Mo. 1909; *Atwinger v. Fellner*, 46 Mo. 276. (2) Defendant cannot by motion to make more definite and certain require plaintiff to furnish the evidence upon which plaintiff expects to prove his case. Sec. 1818, R. S. Mo. 1909.

*S. T. G. Smith* for respondent.

NORTONI, J.—This is a suit for damages said to have accrued on account of an alleged slander. The court sustained defendant's motion to make the petition more definite and certain and this he declined to do. Thereupon the court dismissed the case and plaintiff prosecutes the appeal.

The petition is as follows:

"Plaintiff in this, his amended petition, leave to file the same being first had and obtained, for his cause of action, states that the defendant on or about the 6th day of January, 1911, at the city of St. Louis, Missouri, wilfully, wantonly and maliciously spoke of and concerning plaintiff in the presence and hearing of divers persons, certain false, defamatory and slanderous words, to-wit: 'He' (meaning plaintiff) 'is a thief, a rascal, a scoundrel, a damned hound,' thereby charging and intending to charge plaintiff of the crime of larceny and of dishonesty whereby plaintiff has

been greatly injured in his good name and fame, to his damage in the sum of five thousand dollars, for which he prays judgment."

Defendant's motion so sustained by the court, requiring the petition to be made more definite and certain, invoked an order that plaintiff be compelled to state the names of the persons to whom, or in whose presence, the slanderous words were uttered; also the circumstances under which defendant spoke the alleged slanderous words and the place where the same were spoken. So much of the alleged slander above set forth as charges plaintiff with being a thief is, of course, slanderous *per se*. [See *Bridgman v. Armer*, 57 Mo. App. 528; *Johnson v. Dicken*, 25 Mo. 580.] It appears from the context of the words used and as set out in the petition that they all form a part of one conversation in which defendant charged plaintiff with being a thief.

Our statute (Sec. 1837, R. S. 1909) provides as follows: "In an action for libel or slander, it shall not be necessary to state in the petition any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be not controverted in the answer, it shall not be necessary to prove it on the trial; in other cases it shall be necessary."

Under this statute it has been expressly decided that it is not necessary for plaintiff to set forth the names of the persons in whose presence the words were uttered, or that they were understood by those present. [See *Atwinger v. Fellner*, 46 Mo. 276; see also *Guard v. Risk*, 11 Ind. 156.] It is true in both of the cases cited the question was presented after verdict on the petition, but the rule is declared the same where the slanderous words are actionable *per*

*se* when the question is raised, as here, on a motion to make more definite and certain. [See *Marks v. Jacobs*, 76 Ind. 216.] Indeed, the statute above copied says that it shall be sufficient to state generally the fact that the words were published or spoken concerning the plaintiff. [See, also, 25 Cyc. 446.]

Touching the matter of requiring the petition to be made more definite and certain by stating the place where the slanderous words were spoken, the averment seems to be sufficient, for it is expressly alleged the slander was uttered at the city of St. Louis, Missouri, and the date is given as on January 6, 1911. This will suffice. [See *Dent v. Ryan*, 8 N. Y. Supp. 806.]

The requirement that the petition be made more definite and certain by setting forth the circumstances under which defendant spoke the alleged slanderous words, not only in a measure impinges the spirit of the statute above quoted, which provides that it shall not be necessary to set forth any extrinsic facts for the purpose of showing the application to plaintiff of the defamatory matter, but seems more particularly to run counter to section 1818, Revised Statutes 1909, which provides that no party shall be required to state evidence in his pleading.

We regard the petition sufficiently definite, when considered in connection with the statutes touching the subject-matter, and the motion to make more specific should have been overruled.

The authorities apparently holding a contrary view on the question in judgment are not persuasive here, for they proceed on a statute requiring a bill of particulars in every case when it is called for in order to advise the party, as was ruled in *Tilton v. Beecher*, 59 N. Y. 176, and see its application in *Stiebeling v. Lockhaus*, 21 Hun (N. Y.) 457. We have no such statute in this State and the rule flowing from it is without influence.

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Rigler v. Reid.

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The judgment is, therefore reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

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**B. I. RIGLER, Appellant, v. H. E. REID et al.,  
Respondents.**

**St. Louis Court of Appeals, December 8, 1914.**

- 1. SALES: Fraud and Deceit: Rescission.** One who is defrauded in making a purchase has an election to either affirm or rescind the transaction, but an election to affirm will thereafter prevent a rescission.
- 2. FRAUD AND DECEIT: Sales: Rescission: Evidence.** Where a person made two separate purchases, the former of which he elected to affirm and the latter of which he sought to set aside on the ground of fraud, evidence tending to prove fraudulent misrepresentations with respect to the first purchase was irrelevant and hence inadmissible in the suit involving his right to rescind the second transaction.
- 3. CONTRACTS: Varying Written Contract: Parol Evidence.** Where a written contract of sale was plain and explicit on its face and contained no provision authorizing the vendee to rescind if dissatisfied at the end of thirty days, parol evidence that such option was an agreed provision of the sale was inadmissible, as tending to vary a written contract.
- 4. FRAUD AND DECEIT: Breach of Promise: Sales: Rescission.** The cancellation of a contract of sale on the ground of fraud may not be had for a mere breach of a promise made by the vendor.
- 5. ———: Sales: Rescission: Sufficiency of Evidence.** In an action on a promissory note, defended on the theory that the note was given for the purchase price of corporate stock which defendant was induced to purchase from plaintiff through the latter's fraudulent misrepresentations, evidence *held* insufficient to warrant submission of the defense to the jury, and hence it is *held* a verdict should have been directed for plaintiff.
- 6. ———: Misrepresentations.** The mere fact that a vendor sent persons to the vendee, telling him what a good thing the business purchased was, without more, is insufficient to warrant a finding of fraud.

7. ———: ———: **Opinion.** A statement by the vendor of corporate stock that the stock was very valuable was not sufficient to warrant a finding of fraud, since it amounted to no more than an expression of opinion.
8. ———: ———: **Necessity of Reliance.** Misrepresentations cannot be made the predicate of a finding of fraud if the person to whom they are made is not misled by them.
9. **RESCISSION: Fraud: Necessity of Prompt Action.** The right to disaffirm or rescind a contract on the ground of fraud must be exercised immediately on the discovery of the fraud, and the disaffirmance must be *in toto*. "Immediately" does not mean *instantly*, regardless of hindering conditions, but means a reasonable time, considering the conditions, not to deliberate on whether to rescind, but to do the things necessary in order to rescind.
10. ———: ———: ———. In an action on a promissory note, defended on the theory that the note was given for the purchase price of corporate stock which defendant was induced to purchase from plaintiff through the latter's fraudulent misrepresentations, where it was shown that defendant purchased the stock on May 16th and was immediately elected secretary of the corporation, that he discovered the alleged fraud on June 1st, and thereafter continued to act in connection with the corporation's business and sought to sell the stock to other parties, and did not seek to have the sale rescinded or offer to return the stock to plaintiff until July 29th, *held* that defendant did not attempt to rescind the contract on discovery of the fraud and hence his right to rescind was lost.

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey, Judge.*

REVERSED AND REMANDED (*with directions*).

*A. H. Breidenbach and H. A. Loevy* for appellant.

The decree is erroneous: (a) Representations by appellant even if they turned out to be false are still not fraudulent and therefore not actionable if believed by him (the vendor) to be true. *Bank v. Hutton*, 224 Mo. 70. (b) Even though the statements turned out to be false and were relied on, respondent (the vendee) must still have investigated to hold appellant (the

vendor) liable, having opportunity to do so. *Porter v. Railroad*, 148 S. W. 164; *Fund Co. v. Heskett*, 125 Mo. App. 516; *Jones v. Rush*, 156 Mo. 364; *Sanderson v. Veolcker*, 51 Mo. App. 328; *Sheffield v. Ice Co.*, 168 S. W. 229. If the vendee can investigate, he must. *Fund Co. v. Heskett*, 125 Mo. App. 516. And as he did in this case, the vendor is exonerated. *Coal Co. v. Holdeman*, 163 S. W. 842. (c) Even such exaggerations as that the business would make "a bushel of money a day" or that "the shares of stock would be worth \$200 or \$300 per share in two or three months" (here, that the business would pay 400%) are not fraudulent, and could not avoid purchase note. *Black v. Epstein*, 93 Mo. App. 459; *Crandall v. Greeves*, 168 S. W. 264; *Muck v. Hayden*, 173 Mo. App. 33. (d) Because "puffing" is excusable. *Coal Co. v. Holderman*, 163 S. W. 839. (e) And there is no liability for matters of opinion. *McKee v. Rudd*, 222 Mo. 369. (f) It is imperative that actual knowledge by Dr. Rigler (vendor) of falsity of his representations be shown by vendee. It was not so shown. *Live Stock Remedy Co. v. White*, 90 Mo. App. 503; *Cement Co. v. Stewart*, 103 Mo. App. 185; *Felix v. Shirey*, 60 Mo. App. 624; *Reminer's Case*, 217 Mo. 546.

*Thos. H. Sprinkle* for respondents.

(1) Fraud is proven when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly, without caring whether it is true or false. *Bank v. Hutton*, 224 Mo. 70; *Funding Co. v. Heskett*, 125 Mo. App. 530; *Hamlin v. Abel*, 120 Mo. 188; *Cottrell v. Krum*, 100 Mo. 403; *Cummings v. Parker*, 250 Mo. 439; *Muck v. Hayden*, 173 Mo. App. 27; *Cohn v. Reid et al.*, 18 Mo. App. 115; *Dunn v. Waites, Admr.*, 63 Mo. 181.



NORTONI, J.—This is a suit on a promissory note, but the important question for consideration relates to the equitable defense set forth in the cross-bill. The answer and cross-bill charge the note was induced through fraudulent representations on the part of plaintiff, avers defendant rescinded the contract on discovery of the fraud, and prays the court for a decree of rescission touching the note and the contract of purchase for which it was given. The finding and judgment were for defendant and plaintiff prosecutes the appeal.

It appears that plaintiff, one Bloomer and Williamson were conducting a small business in St. Louis in partnership, manufacturing extracts. About February 25, 1911, this business was incorporated for \$10,000 under the name of the Mound City Extract Company. The goods of the partnership were given over to the corporation in payment of the capital stock of \$10,000 and such stock was issued to plaintiff, Bloomer and Williamson. About March 9, defendant Reid, desiring to go into business, purchased 300 shares of the stock, the face value of which were \$10 each, for \$1,000 from plaintiff, Dr. R. I. Rigler. At the time of this purchase, March 9, it is said plaintiff made certain false representations to defendant with respect to the value of the stock, etc. Among other things, it is said, Dr. Rigler told plaintiff he had invested \$3,500 in the business and that it made a profit of four hundred per cent; however, there is no statement that it made a net profit of that amount. There is evidence tending to prove that some of the receptacles for extracts were not full, as they seemed to be, and that, in fact, the inventory was "stuffed." There is some evidence, too, that all of the liabilities of the company were not truly revealed to defendant—the discrepancy being some five or six hundred dollars thereabout. But, after all, the statement of assets and liabilities that defendant details shows total assets of \$11,488.05 owned by

this \$10,000 corporation and it appears plaintiff purchased \$3000 worth of stock at par value therein from plaintiff for \$1000, or at thirty-three and one-third cents on the dollar.

On March 31, defendant was elected secretary of the company and it appears that he continued in and about its office and plant all of the time and took an active part in managing the affairs of the business. Plaintiff, Dr. Rigler, was a practicing physician, and it is said he was present at the place of business only occasionally. Matters moved along with defendant present in the place of business and Bloomer traveling "on the road" until about the 16th of May, when one Herzog desired to purchase defendant's stock and the controlling interest in the business. On May 16, defendant made a new purchase of stock from plaintiff, Dr. Rigler, with a view, he says, of selling his entire interest to Herzog. By this second purchase, effected on May 16, 1911, defendant procured from plaintiff 460 additional shares of the stock in the company for the agreed price of \$1800, to be paid as follows: \$50 cash and \$1750 by a note, dated May 16, 1911, and due in thirty days. This transaction was evidenced by a written contract of even date therewith, executed by both parties, and as part of the consideration defendant agreed to pay a note held by the Cass Avenue Bank for \$203 and another note to the Merrill Drug Company for \$80. Defendant insists, too, that it was agreed that if he became dissatisfied within thirty days he could surrender the stock to plaintiff, Dr. Rigler, take up his note, and receive the \$50 paid, which was to be returned, and be released from the bargain, but there is no mention of this feature of the transaction in the written contract referred to.

About June 1, defendant had occasion to go through the books of the company and discovered, as he says, that he had been deceived on purchasing his stock on the 9th of March theretofore, in that the liabilities

of the company were several hundred dollars greater than he had understood and the amount of goods on hand was not as great as had been represented to him at the time. Also that plaintiff had not invested \$3500 therein. Thereafter he sought to rescind by tendering the stock purchased on May 16 to plaintiff and demanding the return of his note and the \$50 paid on the purchase of stock. Plaintiff declined to accede to the proffered rescission and said they would straighten the matter out some way, but nothing was done. Several months thereafter plaintiff instituted suit against defendant on the note of date May 16, given in consideration of the second purchase of stock, and defendant sets forth in his cross-bill that the note was induced by fraud; that upon the discovery of the fraud he rescinded the contract; and prays the court for a decree of rescission canceling the note and a judgment awarding him a recovery of the \$50 from plaintiff.

There is much evidence in the record concerning representations made by plaintiff to defendant, pertaining to the first purchase of stock on March 9, 1911, but obviously this is foreign to the issue here in judgment, for the present suit deals alone with the note given May 16, 1911, and the cross-bill seeking a rescission for fraud in the inception of that transaction. Defendant in no wise seeks to rescind the contract by which he purchased the stock in the company of plaintiff on March 9, but, on the contrary, affirms that transaction. A person defrauded into making a contract has but an election and an election once determined is determined forever. An election to abide by the contract will prevent its rescission. Defendant clearly affirms the transaction of March 9, and his cross-bill seeks equitable relief only with respect to the transaction of May 16. The fraud, if any, antedating and concurring with the purchase of March 9, appears to be condoned and ratified by defendant. But though such be true, he details in evidence alleged fraudulent representations with re-

spect to the transaction of March 9 as if they are pertinent to be considered on his cross-bill for rescission of the contract entered into May 16 thereafter. Obviously this evidence is beside the case, for the contract in judgment is to be determined with reference to the facts and circumstances under which it was made. Concerning this matter, we find no substantial evidence in the record tending to prove fraudulent representations sufficient to mislead defendant and authorize the cancellation of the contract entered into on May 16. However, on reviewing plaintiff's evidence, it appears his real ground of complaint on which he seeks a rescission of the contract of May 16 in judgment here is that plaintiff agreed to take back the stock and surrender the note in suit if defendant were dissatisfied at the end of thirty days. But this may not be considered, for the whole transaction was reduced to writing at the time and no such provision appears therein. Obviously this is but an attempt to vary by parol the terms of a written contract plain and explicit on its face. The evidence concerning this matter is to be rejected entirely as of no avail here.

We come now to consider the question of the alleged fraud and false representations, or, in other words, the fraud and deceit practiced by plaintiff on defendant and relied upon as the inducing cause of the contract of May 16 by which defendant purchased the 460 shares of stock and executed the note for same. The substance of defendant's case touching this matter is revealed in the following portion of the record—that is, an extended excerpt from his testimony, which we copy:

“Q. It was May 16 that you bought the second block of stock? A. Yes, sir. Q. Now, from March 9th to May 16th, what, if anything, did Dr. Rigler have to do with the conduct of the company? Did he take any active part in the management of the office? Did he come to the office to do anything? A. Yes, he was

down there quite often; but he had nothing actually to do. He is a practicing physician. He would drop in there every day or two; he would call up a couple of times a day, probably. Q. When you bought this second block of stock and gave this note, what induced you to do it? What did you rely upon? A. He came down there; he had been sending people down there about the stock, looking at the stock and looking at the place, and he didn't like the idea of it getting out only just with us few in; he told me it would be a good thing for me to buy. Q. Is that the reason you bought it? A. On his recommendation. I believed in him; I believed that what he said was right; I thought that he—. Q. What do you mean by 'what he said was right?' A. Well, he had always done what he told me he would do, in the best way; his business dealings had been favorable previous to this time. Q. Did you rely on his statement that he would take this stock back and return your \$50 in 30 days, if you were not satisfied? A. I did. Q. Then you didn't rely on the statement made in March as to the condition of the company? A. Yes; I put that along with what he told me; I thought it must be correct. My investments previous to this time were under the same conditions, and when I asked for the principal, he has returned it to me. Q. Between the 9th of March, when you were put into the office to learn the business and after you bought the first block of stock, and the 16th of May, when you bought the second block of stock, did you discover anything in or about the business or the books of the company that led you to suppose that the statement made on March 9th was not true? A. Only in these checks that came in and the commissions and the few bills that were there. I took it up with them, and they said it would be adjusted later; the doctor said he would fix it up with me. Q. I thought you told me awhile ago that he told you that those checks were issued for money that was due

him personally. A. I kicked on those being paid. Q. What was it he said he would do, when you kicked on that being paid? A. He suggested several times that he would sell some of his stock and put the money into the company. Q. How much? A. He suggested different shares; suggested it different times. Q. Put it into the company—what for? To replace the amount of these checks? A. Yes, sir. Q. Reimburse the company for what it had expended? A. That they hadn't given me. Q. What I am trying to find out from you is what was the inducing cause for your buying this second block of stock; what was it you relied upon that induced you to buy the stock? A. Well, it was this—he kept sending representatives down there and telling me what a good thing this was, and made me believe that the stock was very valuable; his representatives were Mr. Parker, Mr. Sarles, his brother-in-law, and he had two other parties come down. He phoned me that they were coming, and he told me of several parties that he was going to send down to buy stock in the company; he said he was trying to sell his own stock, and he told me in advance that he was about to send somebody down to inquire as to the condition of the company. He told me to show the people around there; tell them what profit was being made, and what he had there, in a general way; most generally Bloomer taken care of them. He also had the arrangement with him as well as with me. Q. What did he tell you to say to these customers about the profits being made? A. About the same as what he had told me. Q. What did he tell you? A. About 400 per cent; he made the statement to me that the company was making 400 per cent before I bought my first stock; that conversation took place out at his office just about the day before I bought my stock. Q. Now repeat that conversation as it occurred, as far as you can. A. I asked him what per cent the company was making; he said about 400 per cent profit. Along

with this conversation he said that he had invested himself personally. Q. Was that gross profit, or net profit, did he say? A. No; he didn't say that. Q. Did the company make a gross profit of 400 per cent on its sales. A. Well, I hardly know whether they did or not; I don't think they did; in fact, I didn't go into the works enough to get to realize what he really did make. the way they bought the stuff in small dribs. I bought this second lot of stock on the 16th of May; after that I continued in the office of the company until June. Then there was arrangements made at the bank at that time for Bloomer to write the checks. I had been signing the checks before that time. The cashier told me about the change when I went to balance the bank book. We kept a bank account at the Cass Avenue Bank; it had been kept there while they were a partnership and after it was incorporated. I left the place about June 16th. Q. Why did you leave? A. Bloomer had not been on the road for several weeks previous to that date; he came in, and he wanted to take charge of the plant; there was nothing for me to do that I could reap any benefit from; I had to go out and do something for a living; he took charge of the place. Q. From the 9th of March until the 16th of June, were you paid anything for your services there? A. Yes; I had something like \$200 altogether; probably a few dollars more than that. Q. Was there any arrangement among you as to how much you should draw? A. There was; \$100 a month. Q. With whom was the arrangement made? A. Dr. Rigler and Mr. Bloomer. Q. Was any one else besides those two consulted about how much you should draw in the way of salary? A. No, sir; that arrangement was made practically between Dr. Rigler and I. The board of directors of the company consisted of Dr. Rigler, Williamson and Bloomer. I never was a member of the board. I was elected secretary about the 31st of March and did not resign as secretary. On June 16th I quit, because there was noth-

ing out there for me to do, owing to the fact that Bloomer had come in, and he wanted to take charge of the plant. I offered to give this stock back to Dr. Rigler and demanded my note and the \$50 before June 16th at his office."

Obviously the statements attributed to plaintiff in this testimony are wholly insufficient to charge him as for false representations so as to infect the transaction with fraud sufficient to authorize a rescission of the contract on that ground. The witness says that he relied principally on the promise of plaintiff to surrender his note and accept the stock in return if he became dissatisfied in thirty days and the evidence concerning this matter is incompetent because it contradicts and varies the written contract, which, separate and apart from the note, details the whole transaction. Furthermore, cancellation on the grounds of fraud may not be had for the mere breach of a promise. The mere fact that men were sent to defendant telling him what a good thing the business was, without more, is insufficient to predicate the charge of fraud and so, too, is the statement that the stock was very valuable. The latter is no more than an expression of opinion, and defendant, being secretary of the company, and in charge of the plant, was certainly not misled thereby. What defendant says on harking back to the representations made in March, to the effect that plaintiff stated the business yielded a profit of 400 per cent counts for nothing because he even disclaims knowledge as to whether that representation is true or false. The witness says that plaintiff did not say whether such a profit was net or gross, and then says, too, that he doesn't know whether that representation was true or false. It is entirely clear that the representations relied upon as fraudulent for a rescission of the contract are insufficient.

Moreover, it does not appear that defendant disaffirmed promptly and tendered the stock to plaintiff



in due time in order to afford him the right of rescission as for fraud and deceit. It is true defendant says he discovered the alleged fraud on the first of June and declared a rescission and tendered the return of his 460 shares of stock to plaintiff immediately before June 16. But it appears from other portions of the record that plaintiff continued in and about the business for some time thereafter and, indeed, sought to sell this stock to other parties. Letters in the record admittedly written by defendant reveal such to be true, and we find the fact to be that he first declared a rescission and tendered the stock to plaintiff about July 29 as stated by plaintiff. The facts and circumstances and letters in evidence overwhelmingly support this view. No one can doubt that the right to disaffirm or rescind a contract on the ground of fraud must be exercised promptly—that is, on the discovery of the fraud—and the disaffirmance must be *in toto*. [See *Estes v. Reynolds*, 75 Mo. 563; *Taylor v. Short*, 107 Mo. 384, 17 S. W. 970; *Dougherty v. Stamps*, 43 Mo. 243.] One who has been defrauded has an election either to affirm or rescind the contract, but he is bound to make that election at once on discovering the existence of the alleged fraud practiced upon him. He is not at liberty to hesitate and delay and wait for a future view of his own convenience or the market value of the property and to put forward an effort to sell the stocks before determining the question of the affirmance or the rescission of the contract. [See *Hart v. Handlin*, 43 Mo. 171.] Of course, “immediately,” in such cases, does not mean *instantly*, regardless of hindering conditions. It may be said to mean a reasonable time considering the conditions and circumstances which prevail; however, such reasonable time is not allowed to speculate on whether to rescind but rather to do the things necessary in order to rescind. [Long v. International Vending Co., 158 Mo. App. 662, 139 S. W. 819.] At most, the right of the party is one of an election to rescind or

affirm the contract and unless he acts with reasonable promptitude thereon in declaring a rescission, he is to be treated as having waived to his right to rescind and elected to affirm the transaction. An election once determined is determined forever, for it cannot be recalled. [See Fry's Specific Performance (5 Ed.), sec. 739; Harms v. Wolf, 114 Mo. App. 387, 89 S. W. 1037.] Defendant should be regarded as having elected to affirm the contract because of his failure to promptly rescind.

For the reasons above pointed out, the judgment should be reversed and the cause remanded with directions to the trial court to enter judgment for plaintiff on the note and dismiss defendant's cross-bill. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

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CONRAD LAUFF, Respondent, v. J. KENNARD &  
SONS CARPET COMPANY, Appellant.

St. Louis Court of Appeals, December 8, 1914.

1. **NEGLIGENCE: Driving Team: Duty of Driver.** A driver of a team, who was delivering goods to a freight platform, about which there were many persons, was guilty of negligence in backing his wagon with great force against the platform, without looking to see that no one was about or giving warning that he was going to back.
2. ———: ———: **Injury to Pedestrian: Physical Facts:** "Second." In an action for injuries sustained by being struck by a backing wagon at a freight platform, evidence by plaintiff that, after seeing defendant's wagon being driven forward, he entered a space between two wagons, to mount the platform, and, a second later, was struck by defendant's wagon, which was backed into the space, was not subject to condemnation as being improbable nor as contrary to the physical facts because of the use of the word "second," since that term was used to express a short interval of time, and not in its precise sense.

3. ———: ———: ———: **Contributory Negligence.** In an action for injuries sustained by being struck by a backing wagon at a freight platform, plaintiff testified that, after seeing defendant's wagon being driven forward, he entered a space between two wagons, to mount the platform, and, a second later, was struck by defendant's wagon, which was backed into the space. *Held*, that it does not conclusively appear from this evidence that plaintiff tarried in the face of a known danger, and hence the question of whether he was guilty of contributory negligence was for the jury.
4. **EVIDENCE: Photographs.** Although photographs which are properly identified and are shown to represent the situation as witnesses saw it are not to be received as evidence of the facts, they are nevertheless admissible as illustrations of the testimony, and this is true even though the situation that existed at the time the photographs were taken was not in all respects precisely as it was at the time of the occurrence in controversy.
5. **APPELLATE PRACTICE: Exclusion of Evidence: Harmless Error.** The improper exclusion, in an action for personal injuries, of photographs of the place of injury was harmless, where the facts and location of the place were so thoroughly described in evidence that the jury were apprised of all the facts they could have discovered from the photographs.
6. **NEGLIGENCE: Pleading: Instructions: Necessity of Submitting Specific Negligence.** Where, in an action for personal injuries, the petition contains specific assignments, as well as a general charge, of negligence, a recovery can be had under the specific assignments only; and even though the petition contains a general charge only, the instructions submitting the question of negligence must require a finding of the particular acts of negligence revealed by the evidence.
7. ———: ———: ———: ———. Where, in an action for personal injuries, the petition charged that defendant's servant, who backed a wagon against him, was negligent in failing to look out for or warn plaintiff, an instruction authorizing a verdict for plaintiff if defendant's servant did not exercise ordinary care was erroneous, for the reason that it did not confine the recovery to the negligence specified.
8. ———: **Driving Team: Injury to Pedestrian: Grounds of Recovery.** The fact that a delivery wagon which backed against and injured plaintiff at a freight platform could have been driven to another place to deliver the goods it carried, furnished no ground of recovery, in an action for the injuries thus sustained.

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Lauff v. Carpet Co.

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Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

REVERSED AND REMANDED.

*Smith & Percy* for appellant.

(1) The court should have sustained the demurrer offered by the defendant at the close of the entire case, as the evidence does not show any negligence on the part of the defendant, and for this reason this cause should be reversed without remanding. Plaintiff's evidence is against reason, and the physical facts show it to be untrue, and cannot sustain this action. *Daniels v. Railroad*, 177 Mo. App. 280; *Scroggins v. Railroad*, 138 Mo. App. 215; *Phippin v. Railroad*, 196 Mo. 343. However if admitted as possible and true, the evidence under the law does not show any negligence on the part of the defendant. *Hitz v. Railroad*, 152 Mo. App. 687; *Lobach v. Railroad*, 172 Mo. 278. It was perfectly plain and obvious to plaintiff at the time that he walked into the space where he was struck what the defendant's driver was attempting to do, and no negligence of the defendant can be inferred from these facts. Where the whole case shows no negligence the court should determine the whole case as a question of law. *Boland v. Railroad*, 36 Mo. 484; *Cogan v. Railroad*, 101 Mo. App. 188; *Hight v. Bakery Co.*, 168 Mo. App. 431. (2) As a matter of law, the plaintiff was guilty of such negligence in walking behind the wagon at the time that it was being backed, as to bar his recovery. The plaintiff's evidence cannot be true, as it is opposed to the physical facts and the defendant's evidence shows such facts as to bar the plaintiff on account of his own negligence in passing behind the wagon while it was being backed. But if plaintiff's evidence be true it shows that the plaintiff was guilty of negli-

gence in not keeping a lookout, as there was a duty upon him, while in the driveway for the use of wagons. *Hitz v. Railroad*, 152 Mo. App. 687; *Hight v. Bakery Co.*, 168 Mo. App. 431. (3) The court committed error in excluding the defendant's photographs marked Exhibits 1, 2, 3, 4, 5 and 6. These photographs are shown by the evidence to correctly represent the situation at the point of the accident at the time that it occurred, and should have been admitted in evidence for the proper instruction of the jury as to the place of the accident. 1 *Wigmore on Evidence*, p. 899; *Dederichs v. Railroad*, 14 Utah, 137; *People v. Buddensieck*, 103 N. Y. 487; *Smith v. Railroad*, 80 Vt. 208; *Threlkeld v. Railroad*, 68 Mo. App. 127; *Dean v. Railroad*, 229 Mo. 446; *Davidson v. Railroad*, 164 Mo. App. 701. (4) The court committed error in admitting the evidence over the objection of defendant that the defendant's driver could have delivered the freight on his wagon intended for the Big Four and Vandalia Railroads to other places than through the central driveway. (5) The court committed error in giving the instruction for the plaintiff numbered 1. This instruction authorizes a recovery if the driver did not use ordinary care. The petition counts on specific acts of negligence while this instruction authorizes a recovery on general negligence. *Barnett v. Paper Mill Co.* 149 Mo. App. 498; *Clark v. Motor Co.*, 177 Mo. App. 623; *Davidson v. St. Louis Transit Co.*, 211 Mo. 320; *McCarthy v. Rood Hotel Co.*, 114 Mo. 397; 6 *Thompson on Negligence* (1905), sec. 7452, p. 493; *Crone v. Oil Co.*, 176 Mo. App. 344.

*George V. Reynolds* for respondent.

(1) Werremeyer saw Lauff, or could have seen him by the exercise of ordinary care in time to have prevented the accident; it was therefore culpable negligence for him to fail to do so. *Gulick v. Clark*, 51

Mo. App. 26. One who drives a vehicle through a crowded thoroughfare in a city is under the duty of being constantly watchful to avoid collisions with persons lawfully on the streets. (2) The rule of law as to the degree of care and the duties of footmen and the drivers of vehicles is, that it must be such care as would be ordinarily taken by prudent persons similarly situated. *Jennings v. Schwab*, 64 Mo. App. 13; *Dieter v. Zbaren*, 81 Mo. App. 612. This is what plaintiff's instructions told the jury. (3) Driving a team of horses at a rapid gait into a narrow space where people are standing in plain view of the driver is prima-facie evidence of negligence and the statement of such negligence is a specification of acts of negligence. *Thompson v. Livery Co.*, 214 Mo. 487. Where a driver of one of defendant's wagons hitched his horses thereto and, without looking to see whether any one was in a position of danger, and without warning, started the team and ran over plaintiff, a coemployee who was working beside the wagon with one of his legs extending in front of the back wheel, negligence in the employer was shown sufficient to warrant a recovery. *Tayng v. Mount Shasta Mineral Spring Co.*, 135 Cal. 141. (4) Photographs are recognized as legitimate evidence, but, of course, there must be something aliunde to show that they are photographs of the place. *Baustian v. Young*, 152 Mo. 317; *Gear v. Lumber Co.*, 134 Mo. 85; *Hunes v. McDermott*, 82 N. Y. 41. They do not prove themselves. *Smart v. Kansas City*, 91 Mo. App. 586. If they do not for any reason appear to represent the subject or the conditions existing at the time of the occurrence in controversy in such a way as to be instructive they will be rejected. 17 Cyc. 419, note 18; *Harris v. Quincy*, 171 Mass. 472; *Verran v. Baird*, 150 Mass. 141. (5) The plaintiff's instructions were proper. *Prendiville v. St. Louis Transit Company*, 128 Mo. App. 596.

NORTONI, J.—This is a suit for damages accrued to plaintiff on account of personal injuries received through defendant's negligence. Plaintiff recovered and defendant prosecutes the appeal.

Plaintiff received his injury through defendant's wagon being backed upon him so as to crush his leg while in the act of mounting the freight platform in the depot of the St. Louis Transfer Company. It appears the St. Louis Transfer Company maintains a large freight depot in the city of St. Louis near Second street and between Biddle street on the north and Carr street on the south. The depot, though roofed overhead, is constructed so that teams and wagons may drive into and through it for the purpose of loading and unloading freight. Two large freight platforms are maintained within the depot and extend north and south from Biddle to Carr streets. One of the platforms is erected on the east side of the passageway for conveyances and the other on the west.

Plaintiff was employed, and had been for many years, by the St. Louis Transfer Company, in the occupation of handling freight on the east platform. Defendant J. Kennard & Sons Carpet Company, is engaged in the wholesale carpet business in St. Louis and frequently delivers carpets for shipment at the freight depot above described. It appears that its driver, Werremeyer, who was in charge of the team at the time plaintiff received his injury, was entirely familiar with the situation and the *locus in quo*, and it is to be inferred from the frequency with which he visited the place in hauling carpets that he knew the habits of the employees thereabout. It was the habit and the custom of the men employed by the Transfer Company in handling freight on the platform, to go out to lunch about noon each day and return through the passageway where wagons and teams delivered goods on and received goods from

the platform. The east platform—that is, the one to which plaintiff was in the act of mounting at the time of his injury—was about five feet in height, and it was the custom of wagons to back up against it either to receive or discharge freight thereon.

It appears plaintiff was returning from his lunch and, entering the wide passageway about 12.45 o'clock p. m., passed defendant's wagon as it was driving into the depot with a load of carpets. On passing defendant's wagon, plaintiff spoke to Werremeyer, the driver, and Werremeyer spoke to him in return, and it is said defendant's wagon was still moving at the time. Defendant's wagon was laden with rolls of carpet for shipment and to be delivered on the east platform at the entrance of the Vandalia and Big Four railroads, for it appears these two carriers occupied the same or adjoining, space at the depot. However, it does not appear that plaintiff knew the destiny of the goods on the wagon or just where they were to be unloaded. The evidence on the part of plaintiffs tends to prove that there were two other heavy stake wagons standing adjacent to the east platform, but lengthwise along beside it so as to leave a space of about twelve feet in width between them. This space was immediately adjacent to the landing of the Vandalia and the Big Four railroads and it appears to be the very space into which defendant's wagon was destined to back to discharge its load. The "southern wagon," as referred to in the evidence, standing besides the platform, was of the character known as a "stiff-tongued wagon," in that the tongue protruded horizontally directly in front, but no team was attached to it at the time. Plaintiff entered into the space, about twelve feet wide, between the two wagons, with the purpose of mounting the platform by stepping upon the stiff tongue of the "southern wagon" and was thus engaged when de-



defendant's wagon with the load of carpets backed upon him so as to catch and crush his leg between the rear end of its wagon and the side of the platform. It appears that defendant's driver, immediately after speaking to plaintiff, turned his horses and suddenly backed the load of carpets into the open space, while plaintiff was in the act of mounting upon the platform and stood with one foot on the stiff and extended tongue of the "southern wagon" and the other upon the platform, said to be about five feet in height above the surface of the passageway. There is evidence in the record tending to prove that such was the usual course of the men engaged about the freight platform on returning from their lunches, and the place was thus more or less frequented by employees of the St. Louis Transfer Company. Many wagons and many persons passed in and out each day, and all in all the situation appears to have been a busy mart. There is direct evidence that no warning whatever was given by defendant's driver before backing his wagon with a load of carpets into the open space and upon plaintiff, and it is to be inferred, too, from the evidence, that the driver made no observation whatever for persons thereabout before attempting to back his wagon into the place.

It is argued the court should have directed a verdict for defendant because no breach of duty on its part appears, but obviously this suggestion is without merit. The evidence is abundant to the effect that men frequented the place where plaintiff was injured, and came upon the platform from lunch precisely as he did. There is an abundance of evidence, too, tending to prove that defendant's driver was sufficiently familiar with the situation and the habits of those engaged thereabout to know that the place was likely to be so used at that hour of the day. Although it was not a public street, it was, nevertheless, a public place, in a sense, and used by wagons

and teams and employees thereabout quite as much as a thoroughfare. The record is replete with evidence tending to reveal these facts to be true. As before said, it appears from direct proof that defendant's driver gave no warning whatever that he intended to back his wagon into the space where plaintiff was injured and an abundant inference is afforded from the entire evidence that he made no observation whatever before backing the wagon with great force against plaintiff and the platform. Obviously, when the circumstances are considered, the precepts of ordinary care would seem to require that defendant's driver should not only have made some observation for persons about to go upon or come from the platform at the time, but should have given a warning as well for their benefit and others likely to be there. It would seem that an ordinarily prudent person would do this much, in order to obviate the probability of injuries to others. The situation and the character of the place were such as to suggest it within the range of probabilities that an injury was likely to befall some one through being crushed by a wagon suddenly backed without warning or observation upon them. Obviously the law devolved the duty upon defendant's driver to anticipate the presence of persons there and make observations and give warning, to the end of rendering them reasonably secure from injury or hurt. The character of the place and its use resemble a public street and the principle attending the use of the one applies with equal force to the other. [See *McCloskey v. Chautauqua Ice Co.*, 174 Pa. St. 34; *Shamp v. Lambert*, 142 Mo. App. 567, 571, 572, 121 S. W. 770; *Ostermeier v. Kingman, etc. Implement Co.*, 255 Mo. 128, 164 S. W. 218.]

But it argued the court should have directed a verdict for defendant because plaintiff's story of the manner of his injury is improbable, in that it is contrary to the physical facts, and because, too, he was

evidently guilty of contributory negligence. Much is said touching plaintiff's evidence to the effect that, upon his speaking to defendant's driver and the driver's returning the salutation, he immediately turned into the space to mount the platform and the wagon backed in upon him before he reached a place of safety. It is true plaintiff said defendant's wagon was still moving forward and had not commenced to back in at the time he spoke to the driver. And it is true, too, that plaintiff's story, if full value is given to every word, as it appears—for he says it was but a second—seems to be an improbable one. But though such be true, we do not regard it so highly improbable as to render the question one about which different minds could not entertain divergent views, for the word "second" is promiscuously used to express a short interval of time and not always in its precise sense. It may be that plaintiff tarried for an instant or walked very slowly so as to consume the time occupied by defendant's driver in stopping his team and commencing the backward run of the wagon. Plaintiff's evidence is not so completely at variance with known physical laws as to remove it from the province of the jury, and while there may be a suggestion that he was somewhat remiss with respect to the duty to look out for his own safety, it does not appear conclusively that he tarried, without care, in the face of a known danger. The question concerning his contributory negligence was clearly one for the jury.

On the trial defendant sought to introduce several photographs of the situation described in evidence, showing wagons located as they were at the time, the place of plaintiff's injury and wagon which occasioned his injury, set as at the time; but the court excluded these on the objection of plaintiff's counsel, and to this ruling defendant excepted. The court seemed to entertain the view that, in order for the

photographs to be admissible, they must reveal the situation in all of its attendant details precisely and identically as it was at the time. It is true the photographs were taken some time after the occurrence, as is usually the case, but the evidence introduced in connection with them is to the effect that at least two of the wagons photographed were the identical wagons present at the time plaintiff received his injury. Defendant's wagon shown by the photograph was the same and loaded with carpets as nearly thereto as could be as it was when plaintiff was injured. In every material respect, the photographs, according to the evidence of the witness, appear to truly portray the *locus in quo* and the arrangement of the wagons and show the precise place at which plaintiff received his injury. It is entirely clear that these photographs were admissible for what they were worth, though, of course, they were in nowise conclusive on the question.

Mr. Wigmore, in his valuable work on Evidence, Vol. 1, sec. 792, says: "If a qualified observer is found to say, 'This photograph represents the fact as I saw it,' there is no more reason to exclude it than if he had said, 'The following words represent the fact as I saw it,' which is always in effect the tenor of a witness' oath. If no witness has thus attached his credit to the photograph, then it should not come in at all, any more than an anonymous letter should be received as testimony. There can be no middle ground between these two consequences. Occasionally a court is found excluding a photograph as being misleading; but this is a begging of the very question which the jury have to decide; it would be as anomalous as if the judges were to order a witness from the stand because he was believed by the judge to be lying. Perjury cannot be thus determined in advance by the judge—not more for photographic than for verbal testimony."

It is true, while the photographs themselves are not to be received as evidence of the facts, they are, if properly identified, as in this case, when shown to represent the situation truly, as the witness saw it, competent as illustrations of the testimony, and to this extent are to be received and considered for what they are worth. [See *Baustian v. Young*, 152 Mo. 317, 324, 53 S. W. 921; *Geer v. Missouri Lumber, etc. Co.*, 134 Mo. 85, 34 S. W. 1099; *Dean v. Wabash R. Co.*, 229 Mo. 425, 446, 447, 129 S. W. 953.] Of course, sometimes photographs are misleading through being made from a viewpoint to confuse, and in such cases should be excluded, if the evidence shows such to be the fact concerning them; but nothing of that kind appears here. These photographs are said to be truly representative of all of the essential details of the case, and the mere fact that the identical wagons were not employed and that they were taken subsequent to the time of the injury are unimportant. However, as the facts of the case are so fully developed in evidence, we would hesitate to reverse the judgment for this alone, because we cannot say, as the statute requires, that the error in excluding the photographs was manifestly prejudicial to defendant. The situation, the location of the wagons and the precise manner in which plaintiff received his injury were so thoroughly detailed in evidence that the jury were obviously apprised of all of the facts though they were denied the illustration of the evidence which the photographs portrayed.

But the judgment may not be sustained for that it seems the jury were permitted by plaintiff's instructions to give a verdict against defendant without heed to the specifications of negligence relied upon in the petition and on any theory of the remission of duty which it might evolve on the facts. The petition, besides containing a general averment of negligence, counts upon the failure of defendant's driver to warn

plaintiff that he was about to back the wagon and, further, upon the fact that the driver made no observation or lookout before backing the wagon upon him. It is unnecessary to copy the petition here, for such in substance are the two specific acts of negligence set forth and relied upon for a recovery. It is the established and accepted law that where specific acts of negligence are set forth in a petition, which contains likewise a general allegation of negligence, such specific negligent acts are to be treated as superseding the general averment and the plaintiff must recover on them, if at all. [See *McManamee v. Missouri Pac. Ry. Co.*, 135 Mo. 440, 37 S. W. 119; *Barnett v. Star Paper Mill Co.*, 149 Mo. App. 408, 130 S. W. 1121; *Gibler v. Quincy, O. & K. C. R. Co.*, 148 Mo. App. 475, 128 S. W. 791; *Waldhier v. Hannibal, etc. R. Co.*, 71 Mo. 514; *Clark v. General Motor Car Co.*, 177 Mo. App. 623, 160 S. W. 576.] Moreover, it is the rule, too, even in those cases where the averment of negligence is general in character and no specific acts are alleged, that the instructions must require the jury to find the particular acts of negligence said to be revealed by the testimony. This is true because defendant is entitled to have the jury committed by the instructions to the case made in the evidence. [*Sommers v. St. Louis Transit Co.*, 108 Mo. App. 319, 83 S. W. 268; *Miller v. United Rys. Co.*, 155 Mo. App. 528, 134 S. W. 1045.] The rule is the same in, and finds special application to, those cases, such as this one, where the petition counts on specific acts of negligence, for then the instruction must require the jury to respond to the precise charges laid in the petition and said to be established in the evidence. The authorities are multiplied on the subject. [See *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 81 S. W. 1142; *Beave v. St. Louis Transit Co.*, 212 Mo. 331, 111 S. W. 52; *Davidson v. St. Louis Transit Co.*, 211 Mo. 320, 109 S. W. 583; *Crone v. St. Louis Oil Co.*, 176 Mo.

App. 344, 158 S. W. 417; Miller v. United Rys. Co., 155 Mo. App. 528, 134 S. W. 1045; Clark v. General Motor Car Co., 177 Mo. App. 623, 160 S. W. 576.]

Plaintiff's first instruction, which purports to cover the whole case and authorize a verdict for him, impinges the rule above stated in that it incorporates no requirement whatever to find either of the specific acts of negligence relied upon, but, on the contrary, is so general in its terms as to permit the jury to wander at random. The instruction is as follows:

"If you find and believe from the evidence that the plaintiff in this case, while going to his work and in attempting to mount the east platform referred to in the evidence, was exercising that degree of care which an ordinarily prudent person would have exercised under similar circumstances and conditions, and that he was run into and his left leg crushed by a wagon driven by an employee of the defendant, J. Kennard & Sons Carpet Company, and that the defendant, J. Kennard & Sons Carpet Company's wagon was backed into the space referred to in the evidence between the north and south wagons referred to in the evidence, in a negligent way, by the defendant's driver—that is to say, if you find and believe from the evidence that the driver of defendant's wagon in backing his team into the space between the north and south wagons referred to in the evidence did not exercise ordinary care—that is to say, in such a way as an ordinarily prudent person under similar circumstances and conditions would have backed his wagon—and that the plaintiff was injured as the result of the failure on the part of defendant's driver to exercise the degree of care as hereinabove set out, then your verdict shall be for the plaintiff in such sum as, considering all the facts in the evidence, will be a fair and reasonable compensation to him for the injury which plaintiff has received—not, however, to exceed the sum of \$15,000."

In defendant's examination of Sullivan, the foreman at the transfer depot, it cropped out that defendant might have unloaded its goods in the alley, if it had chosen to do so—that is, at an approach to the east platform through the alley and outside of and apart from the place where plaintiff was injured. Plaintiff's counsel seized upon this and pressed it by further examination, over the objections and exceptions of defendant, so as to elicit much evidence as if to suggest that defendant had violated some duty in entering the usual passageway and backing the wagon up to discharge the goods where it did. The arguments of plaintiff's counsel on the objection made reveals, too, such to be the purpose of pressing this examination. Obviously no breach of duty could be assigned against defendant on this score and all of this evidence was prejudicial. It is referred to here, however, more particularly because of the fact that the general language of the instruction above copied authorizes the jury to find against defendant on any theory of negligence it might evolve on the testimony and in no manner requires a finding of the facts set forth in the petition and relied upon. It is true the instruction requires the jury to find that defendant did not exercise ordinary care in backing its wagon, but, nevertheless, these general requirements in instructions in negligence cases the courts, including the Supreme Court, say are to be condemned because they permit the jury to evolve some theory of liability which may be entirely foreign to the issue presented in the pleadings. [Sommers v. St. Louis Transit Co., 108 Mo. App. 319, 83 S. W. 268; Beave v. St. Louis Transit Co., 212 Mo. 331, 351, 352, 111 S. W. 52.]

Plaintiff's second instruction seems to proceed as if the duty to make observations before backing the wagon rested upon defendant's driver, and we believe so much of it is well enough. But it authorizes a verdict for plaintiff on a general finding of



negligence—that is, on the jury's finding that "defendant's driver failed to exercise that care as defined above, and that as a result of the failure of the defendant's driver to exercise said care the plaintiff received the injury referred to in the evidence." This instruction should be redrafted so as to require the jury to find in what respect defendant breached its duty with reference to the averments of negligence contained in the petition.

For the errors in the instructions above pointed out, the judgment should be reversed and the cause remanded. *Allen, J.*, concurs. *Reynolds, P. J.*, not sitting.

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G. A. MADDUX, Appellant, v. ST. LOUIS UNION TRUST COMPANY, Respondent.

St. Louis Court of Appeals, December 8, 1914.

1. **REAL ESTATE BROKERS: Right to Commission.** A real estate broker who procures a purchaser ready, willing and able to buy on the owner's terms is entitled to the agreed commission, although the sale was not completed because of a defect in the title, and especially is this so where the brokerage contract required the owner to furnish an abstract showing good title.
2. ———: ———: **Representing Adverse Interest.** A broker who represents an adverse interest without the consent of his principal forfeits his commission.
3. ———: ———: ———. The doctrine that a real estate broker forfeits his commission if he represents an adverse interest, without the consent of his principal, is based on fraud, and such conduct, therefore, may not be presumed, but must be found from facts constituting substantial evidence on the issue.
4. **FRAUD AND DECEIT: Evidence.** Fraud cannot be presumed nor established by conjecture or suspicion, and substantial evidence is required to prove it.

5. **REAL ESTATE BROKERS: Right to Commission: Representing Adverse Interest: Sufficiency of Evidence.** In an action by a real estate broker for a commission for finding a purchaser for real estate, defended on the theory that the broker had forfeited his commission by reason of the fact that he had represented the buyer without the consent of defendant, evidence held insufficient to warrant the submission of the defense to the jury.

Appeal from St. Louis City Circuit Court.—*Hon. Irvin V. Barth*, Judge.

REVERSED AND REMANDED (*with directions*).

*Chas. B. Stark*, for appellant; *Parks & Bell* and *C. F. Schneider* of counsel.

(1) It is well-settled law in this State that a real estate broker performs his duty, and is entitled to his commissions, when a purchaser is introduced who is ready, willing and able to buy on the terms authorized by the principal. *Gelatt v. Ridge*, 117 Mo. 553; *Finley v. Dyer*, 79 Mo. App. 604; *Hayden v. Grillo*, 42 Mo. App. 1, s. c., 35 Mo. App. 647; *Bailey v. Chapman*, 41 Mo. 536; *Love v. Owens*, 31 Mo. App. 501; *Collins v. Fowler*, 8 Mo. App. 588; *Cheatham v. Yarbrough*, 90 Tenn. 77. (2) The principal cannot relieve himself from liability for commissions by a refusal to consummate the sale. *Bailey v. Chapman*, 41 Mo. 536; *Hayden v. Grillo*, 35 Mo. App. 647; *Glentworth v. Luther*, 21 Barb. 145; *Kock v. Emmerling*, 22 How. (U. S.) 69. (3) Nor because of a defect in his title. *Christensen v. Wooley*, 41 Mo. App. 53; *Collins v. Fowler*, 8 Mo. App. 588; *Fisher v. Drewest*, 7 Rep. 351; *Love v. Owens*, 31 Mo. App. 501; *Gonzales v. Broad*, 57 Cal. 224; *Cavender v. Waddington*, 5 Mo. App. 457; *Cheatham v. Yarbrough*, 90 Tenn. 77; *Mechem Agency*, secs. 966, 967; 2 *Addison Contr.*, sec. 931; 2 *Am. & Eng. Ency. Law*, 578, 581; *McGavock v. Woodlief*, 20 How. (U. S.) 221; *Kock v. Emmer-*

ling, 22 How. (U. S.) 69; Frazier v. Wyckoff, 63 N. Y. 448; Cook v. Fish, 12 Gray, 493; Vinton v. Baldwin, 88 Ind. 104; Gilchrist v. Clarke, 2 Pickle, 585; Parker v. Walker, 2 Pickle, 569; Roberts v. Kimmons, 65 Miss. 332. (4) The condition prescribed by the purchaser that a good title should be made to her was merely what the law implied without incorporating it in her contract and did not relieve the vendors from liability for commissions. Roberts v. Kimmons, 65 Miss. 332; Folliard v. Wallace, 2 Johns. 395; Middleton v. Findla, 25 Col. 76; Hamlin v. Schulte, 34 Minn. 534; Gauthier v. West, 45 Minn. 192; Crosto v. White, 3 N. Y. Supp. 682; Hally v. Gosling, 3 E. D. Smith, 262; Birmingham Co. v. Thompson, 86 Ala. 146. (5) The plaintiff's case having been fully established by documentary evidence and by the deposition of the sole witness in the case it was the duty of the court to give the peremptory instruction for a verdict as prayed by the plaintiff. Bank v. Hainline, 67 Mo. App. 483; Morgan v. Durfee, 69 Mo. 469; Commissioners v. Clark, 94 U. S. 278; Connor v. Giles, 76 Me. 132; 2 Thompson on Trials, sec. 2249; Proffatt Jury Trial, secs. 351, 352, 354 and cases cited.

*Henry B. Davis, Charles Erd and Carlisle Durfee*  
for respondent.

(1) A real estate agent or broker cannot represent both the buyer and seller in the same transaction, unless with the implied or express assent of the parties represented. And either principal, without showing injury to himself, may avoid a contract made by a dual agent, without his knowledge of such dual agency. Lawson on Contracts (1 Ed.), sec. 181; Cor-der v. O'Neil, 207 Mo. 632; Connor v. Black, 119 Mo. 126; Chapman v. Currie, 51 Mo. App. 43; Winter v. Carey, 127 Mo. App. 601; Witte v. Storm, 236 Mo. 470. (2) And either principal may avoid the con-

tract, to the extent of refusing to reimburse the agent for any expenditures which he may have been authorized to make in the course of his negotiations for a sale of the property. 31 Cyc. pp. 1539-1540; *R. R. v. Morris*, 10 O. Cir. Ct. 502; *Williamson v. Lumber Co.*, 43 Ore. 337.

NORTONI, J.—This is a suit by a real estate agent for his commissions. The finding and judgment were for defendant and plaintiff prosecutes the appeal.

It appears that plaintiff is a real estate agent, doing business at Nashville, Tennessee. The suit was originally instituted against Matilda J. Childress and her husband, Thomas B. Childress, for commissions said to have been earned by the agent in finding a purchaser who was ready and able and willing to buy certain real estate owned by Matilda J. Childress in Nashville. After the suit was instituted and before the trial, both defendants departed this life at St. Louis, Missouri, where they resided. The real estate was owned by Matilda J. Childress alone, and, as before said, situate at Nashville. Her husband, Thomas B. Childress, was, therefore, but a nominal party defendant. As to him the suit abated at his death, but it was revived against the estate of Matilda J. Childress and the present defendant, St. Louis Union Trust Company, as executor of her estate, substituted as a party defendant in her stead.

It appears that Matilda J. Childress desired to sell her property situate on Cherry street in Nashville, Tennessee, at the price of \$50,000. Plaintiff came to St. Louis on May 28, 1909, visited Mrs. Childress and her husband, and arranged with them to represent her in making the sale for a commission of \$1000. A written contract was entered into by Mrs. Childress and her husband on that date, whereby plaintiff was authorized to sell the property for \$50,000. However, it was agreed in the contract of agency that Mrs.

Childress would borrow \$22,000 on the property from the Northwestern Mutual Life Insurance Company at five per cent interest, which loan the purchaser should assume and also pay to Mrs. Childress \$18,000 in cash and give a second mortgage on the property to Mrs. Childress for \$10,000, to be represented by two separate notes bearing six per cent interest. It was further stipulated, too, that Mrs. Childress would furnish an abstract showing good title to the property, which should be delivered to the purchaser.

On the following day, May 29, 1909, plaintiff effected a sale of the property to Mrs. Annie Simon of Nashville, Tennessee, who appears to have been a lady of means and amply able to buy. Mrs. Simon agreed in writing to take the property at the price of \$50,000 and on the terms prescribed in plaintiff's contract of agency, provided the title thereto was found to be good. The case concedes that Mrs. Childress and her husband executed the contract of agency to plaintiff above stated and that he effected a sale of the property through finding a purchaser in the person of Mrs. Simon, who was ready and able and willing to buy on the terms prescribed. But it appears the sale was not finally consummated in point of fact, for the reason that the title to a portion of the property was found to be defective and the owners failed to correct it. So much appears from the written contract in evidence and admissions and stipulations of fact introduced at the trial. It is agreed, too, that plaintiff expended, by and with the authority of Mrs. Childress and her husband, \$49.75 in procuring an abstract of title to the property and that this amount has not been repaid to him, though it was expended for the use and at the instance of the Childresses.

There can be no doubt that these facts are sufficient to authorize a recovery for plaintiff, unless some sufficient and valid reason apart therefrom appears to defeat his right. [See *Hayden v. Grillo*, 35 Mo. App.

647.] Here the owner of the property, plaintiff's principal, agreed in writing to furnish a good and sufficient title, but aside from this the obligation to do so rested upon her, in so far as the plaintiff's right to recover his commissions is concerned, for he fully performed on finding a purchaser ready and able and willing to buy on the terms prescribed in his commission of authority. [See *Christensen v. Wooley*, 41 Mo. App. 53, 61; *Collins v. Fowler*, 8 Mo. App. 588.]

But the court referred the case to the jury as if there were evidence tending to prove that plaintiff performed a dual agency and thus forfeited his right to recover, because, forsooth, he represented both the seller and the purchaser at the same time. The jury found the issue for defendant on this theory. Obviously one may not, with entire fidelity, serve two masters, representing adverse interests, in ordinary commercial transactions, at the same time, and because of this the salutary rule obtains that if a dual agency appears, without the consent of the principal, the agent forfeits his commission and may not recover. [See *Corder v. O'Neill*, 207 Mo. 632, 645, 646, 647, 106 S. W. 10; *Connor v. Black*, 119 Mo. 126, 24 S. W. 184; *Neuman v. Friedman*, 156 Mo. App. 142, 136 S. W. 251.] But the doctrine proceeds on the ground of fraud and bad faith. Obviously, therefore, such conduct on the part of an agent may not be presumed, but must be found from the facts of the case, and such facts must be sufficient to constitute substantial evidence on the issue thus made. After reading all of the evidence introduced at the trial several times, we are persuaded that it is wholly insufficient to support the finding of bad faith in that plaintiff represented both the purchaser and the seller of the property at the time. There is no admission nor stipulation tending to show that plaintiff represented Mrs. Simon in any way, but, on the contrary, it appears he represented the Childresses in making the sale. The only evidence said to suggest

that plaintiff occupied a position of dual agency is that of Mrs. Simon, and we copy it in full. Indeed, Mrs. Simon is the only witness who testified in the case and her evidence in full is as follows:

“Q. Mrs. Simon, please state your full name, age and present place of residence? A. Annie Simon; 56 years; 112 Vauxhall street, Nashville, Tenn.

Q. If you at any time endeavored to purchase the property owned by defendants, Matilda J. and Thos. B. Childress, on Cherry street in the city of Nashville, state with whom your negotiations were conducted. A. With Mr. Maddux.

Q. Did your negotiations in reference to this property result in a contract on your part to buy same? A. Yes, sir, I did contract to buy it.

Q. Examine Exhibit A to the deposition of Gus A. Maddux and state if that paper was signed by you and if it is the contract referred to by you? A. Yes, sir.

Q. State if your acceptance of this contract was in good faith and if you were at that time willing and able to purchase the property described in the contract on the terms and conditions therein set out, if good title to same was made to you? A. I was.

Q. Were you then and are you now financially able to pay for this property upon the conditions mentioned in this contract? A. I was in position then, but I think I could arrange it now even.

Q. State whether Mr. Maddux was in any way employed by you or was to be in any manner compensated by you for his services in connection with the purchase and sale of this property? A. I did not agree to compensate him anything.

#### CROSS-EXAMINATION.

Q. Mrs. Simon, did you represent yourself in this matter? A. Did I represent myself? Yes, sir.

Q. Were you going to buy this with your own money? A. Well, part of it and part the Northwestern Mutual Life Ins. Co. were to loan me.

Q. How much were the Northwestern Mutual Life Insurance Co. to loan you? A. \$22,000.

Q. How much were you to pay yourself? A. The balance, \$28,000.

Q. Were you at that time financially able to do that? A. Yes, sir.

Q. Nobody had any interest in the transaction except yourself? A. No, sir.

Q. How did you happen to go to Mr. Maddux, had he attended to other business for you? A. No, sir. You mean in regard to this property?

Q. I mean had he been your agent in any other matters? A. I went to his office. I gave him other property to rent, but he never succeeded in renting it.

Q. Then he had acted as your agent in other matters? A. Well, he tried to, but didn't succeed.

Q. But nevertheless he had charge of a portion of your property in an endeavor to rent it and to that extent acted as your agent, to the extent of trying to rent the property? A. Yes, sir.

Q. When did that agency cease, Mrs. Simon? A. I just can't remember. When the Riddle lease terminated, I got him to rent it and when he couldn't, then that ended it, that's all.

Q. When was that in point of time, if you remember, that he couldn't rent it? A. It is over three years ago. I think it is about three years.

Q. In regard to the purchase of the property of the defendants, did you approach Mr. Maddux about it, or did he come to you? A. I came to him.

Q. For what purpose did you go to him? A. I wished to buy some centrally located property as an investment, and I asked him if he had anything that he thought would suit me.



Q. You knew he was going to make the trip to St. Louis on the 28th, that is, start on the 27th of May last year, didn't you? A. I knew he made the trip, but don't know the date.

Q. Is the trip you refer to the one in which he went to St. Louis to get the promise from the defendants to sell the property? A. Well, he had corresponded with them long before in regard to this property, and this was the final arrangement. To be the final arrangement of my purchase of the property.

Q. Then this was the trip that you speak of that was to close up the deal? A. Yes, sir.

Q. Now, you had authorized him to make an offer for the property in question, of \$45,000, did you not? A. I don't remember that. I know it was to be \$50,000.

Q. Have you no recollection of telling Mr. Maddux to offer the defendants \$45,000 for the property, but if he couldn't get it for that, he might increase the offer more? A. Not at that time.

Q. When did you make that statement to him? A. That was in the correspondence between them.

Q. Mrs. Simon, I am speaking now exclusively of conversations between you and Mr. Maddux without reference to the correspondence between Mr. Maddux and Mr. Childress? A. I am speaking now of the time when he went to St. Louis in regard to the \$50,000.

Q. You had instructed him prior to his going to St. Louis to offer the defendants \$50,000 for the property, providing, of course, always that the title was good? Is that your answer? A. That was at the time he first offered the property for sale to me.

Q. You had instructed him prior to his going to St. Louis to offer to the defendants \$50,000 for the property? A. I did not. That was during the correspondence, but when he went there it was to close the sale and get their signatures.

Q. At what figure was he to close the sale? A. \$50,000.

Q. Now was any other sum mentioned immediately prior to his going to St. Louis than \$50,000? A. No, sir.

Q. Was that when he left Nashville to go to St. Louis that he had your authority to offer \$50,000 for the property, provided, of course, the title was to your satisfaction? A. Well, Mr. Childress positively refused to take any less before Mr. Maddux went to St. Louis—he would not take any less, he wanted \$50,000 and so I just accepted to the terms he asked for.

Q. So that he went to St. Louis to offer them \$50,000 for this property? A. I suppose so.

Q. When he went to St. Louis you had authorized him to go to St. Louis, and you had authorized him to offer \$50,000 for the property? A. I had.

Q. Upon his return from St. Louis you attached your signature to the acceptance of the offer which is marked Exhibit A to this deposition? A. Yes, sir.

#### RE-DIRECT EXAMINATION.

Q. You stated in your cross-examination that when Mr. Maddux went to St. Louis he was authorized by you to make certain offers. I want to ask if you had ever given Mr. Maddux any written authority of any kind or had employed him in any way to buy this property for you? A. Yes, I authorized him to make the trade there. I didn't authorize him to buy it for me, I don't think for myself.

Q. Were you making an offer through Mr. Maddux for this property? A. Yes, sir.

Q. Did you expect to buy the property yourself through Mr. Maddux, or have Mr. Maddux buy for you? A. I can't understand that? He acted as my agent in the matter?—no.

Q. Was Mr. Maddux your agent in this deal or the Childress' agent? A. He was their agent, of course.

Q. You have stated, I believe, that you did not promise to pay him any compensation for services in this matter? A. Yes, sir. I did not expect to pay him anything.

Q. Did you sign any paper of any kind agreeing to purchase at any price the property described in exhibit A to this deposition until you signed an acceptance of the offer on May 29th? A. No, I did not. This was the only paper.

Q. Then your only contract in reference to the purchase of this property was an acceptance of the authority given by Matilda J. and Thos. B. Childress in reference to the purchase of this property? A. It was.

Q. Have you had considerable experience in the purchase of real estate? A. Well, I have had some.

Q. Do you, or not, own considerable rental property in the city of Nashville? A. I own several houses here.

Q. What do you know of the custom in the city of Nashville with reference to compensation to real estate agents in a case of sale of property, as to who pays the agent? A. I think there is a custom that the one that sells pays the commission, and I think I have had some experience and that I am somewhat of an expert in the case.

Q. State whether or not you were anxious to purchase this property and what propositions, if any, were made to defendants on your behalf in reference to waiting and giving them time to perfect the title to the premises? A. I was very anxious to get the property. I went to Mr. Maddux and asked him to write to the defendants to try and have it perfected. Now, Mr. Maddux can say what answer they gave him. I was willing to wait, but they haven't done anything towards it.

## RE-CROSS EXAMINATION.

Q. Mrs. Simon, why were you anxious to close this deal? A. Because I thought it was a good investment.

Q. Didn't you think it was a bargain? A. Yes, I thought it was a bargain and good investment."

Mrs. Simon repeats several times that plaintiff did not represent her, but, on the contrary, represented the Childresses, and it is clear that his mission to St. Louis on May 28, 1909, was not to beat down the price of the property, but rather to obtain the written authority, including the terms of sale, so that no controversy might arise thereafter. The mere fact that plaintiff had represented Mrs. Simon in connection with renting one of her buildings some three years before is insufficient to justify an inference that he represented her as an agent in purchasing this property, especially in view of her positive statement to the contrary. Fraud and bad faith in dealing is to be shown in the facts and circumstances in evidence and may not be presumed, nor will it suffice to determine it alone on conjecture and suspicion. There must be substantial evidence tending to prove it in order to sustain a finding of bad faith. Obviously the court erred in submitting this question to the jury, for there is no substantial evidence in the record tending to prove that plaintiff represented Mrs. Simon as her agent at the time.

The judgment should, therefore, be reversed and the cause remanded with direction to the trial court to enter judgment for plaintiff for \$1000, the amount of the commission stipulated for in the contract, and \$49.75, the amount paid out for the abstract of title, together with six per cent interest on the entire amount from the date of the institution of this suit. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

**ROBERT A. BROWN, Respondent, v. CHARLES W. WALL, Appellant.****St. Louis Court of Appeals, December 8, 1914.**

1. **LANDLORD AND TENANT: Lease: Implied Covenants.** Unless a lease contains stipulations to the contrary, there is an implied covenant on the part of the lessor, that, when the time comes for the lessee to take possession under the lease, the premises will be open to his entry; but such implied covenant does not impose upon the lessor the obligation to physically put the lessee in possession, and if the premises are open for entry by the lessee at the proper time, and a stranger subsequently interferes with his possession, the implied covenant is not breached and the landlord is not liable therefor.
2. ———: ———: ———: **Interference of Third Party: Right of Tenant to Recover Rent Paid.** Plaintiff leased a house from defendant and paid two months' rent in advance, it being agreed that he could take possession at any time he chose. Defendant delivered the key to the premises to him, and thereafter he cleaned out the house and moved in some furniture. While the balance of the furniture was being moved in, the police interfered with plaintiff, informing him that he would not be allowed to live in that neighborhood. In an action to recover the rent paid in advance, on the theory that the implied covenant for peaceable possession was breached, *held* that, in view of the fact that the premises were open for occupancy at the time plaintiff's right thereto accrued and that he was prevented from enjoying the occupancy thereof through no fault of defendant, but simply because of the act of a stranger, with whom defendant had no connection, plaintiff was not entitled to recover; the rent paid in advance having been paid pursuant to the lease and not by virtue of plaintiff's occupancy of the premises, and defendant not having breached the lease, was under no obligation to return such advance payment.
3. ———: ———: **Tenancy at Will: Rent.** Rent becomes due under a common-law tenancy at will only in consequence of occupation.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

REVERSED.

*John C. Vaughan* for appellant.

The court erred in admitting evidence of the action of the police in refusing to allow plaintiff to place his furniture in the premises. The landlord is not liable for these acts of a mere stranger not in possession or claiming the right to possession of the property. *King v. Reynolds*, 67 Ala. 229; *Hueist v. Marx*, 67 Mo. App. 418; *Podalsky v. Ireland*, 121 N. Y. Supp. 950; *Browder v. Edmonson*, 7 Ga. App. 843; 24 Cyc. 1050 and 1051.

*Willis H. Clark* for respondent.

The judgment appealed from is fully justified under the law and upon the evidence. *Hughes v. Wood*, 50 Mo. 350; *Rieger v. Welles*, 110 Mo. App. 166.

NORTONI, J.—This is a suit for damages and to recover \$150 paid on a contract of lease. The finding and judgment were for plaintiff and defendant prosecutes the appeal.

It appears that, on February 4, 1910, plaintiff leased an apartment from defendant, situate at the northwest corner of Vandeventer avenue and Olive street, in the city of St. Louis, for the term of one year, to commence on the fifteenth day of that month. By the terms of the agreement entered into between the parties, plaintiff was to pay a rental of \$75 per month, but was to pay \$150 in advance, which should be applied in payment of the last two months' rent, under the lease. It was agreed, too, that while plaintiff's term should not commence until the 15th day of February, 1910, he might move into the premises and occupy the same at any time theretofore he chose to elect.

On the day the contract was entered into—that is, February 4, 1910—plaintiff paid defendant \$150 to be applied in payment, as before stated, on the last two months' rent for the term. A day or two thereafter, plaintiff was given the key to the premises, for they were then unoccupied, and his wife visited them with a view of preparing to move in and taking possession. On the occasion of this visit, she swept the rooms and prepared them for occupancy. Thereupon plaintiff elected to take immediate possession, under the agreement, and remove his household goods thereto. On February 7 or 8, he caused two loads of his household goods to be transported and placed in the apartment, and the third load was being unloaded when the police of the city of St. Louis interfered. About this time, plaintiff's wife reached the premises with a view of arranging the furniture in position and establishing the home, when she met with objection from a police officer against further proceeding thereabout. It appears plaintiff and his wife are negroes, and, it is said the police asserted that colored people would not be tolerated in that neighborhood. Thereupon plaintiff's wife remonstrated with the officer, saying her husband had leased the premises, and, as a result of the controversy, she was taken into custody and lodged in the city jail. On the following day, her husband, plaintiff, called to see her at the jail, and he, too, was arrested and incarcerated therein, where both remained until the following day. Upon their release, or soon thereafter, plaintiff caused his furniture to be removed from the apartment, stored it, and failed to occupy the premises or pay further rent therefor.

There is no evidence even suggesting an inference that the police acted either for or at the instance of defendant (lessor), and the case is one where the lessee was prevented from occupying the premises by the intrusion of a stranger. On these facts, the suit proceeds to recover the \$150 paid defendant on the

contract of lease, which was to be applied on the last two months' rental of the term, and damages flowing from a breach of the implied covenant for quiet enjoyment, which embraces the obligation to confer possession on the lessee.

There can be no doubt that where there is a contract of lease and no stipulation to the contrary, there is an implied covenant on the part of the lessor that, when the time comes for the lessee to take possession under the lease, according to the terms of the contract, the premises shall be open to his entry. Such is the English doctrine, which has been adopted and obtains in this State, as will appear by reference to *Hughes v. Hood*, 50 Mo. 350.

In the case cited, the suit of the lessee for damages on this implied covenant, because of its breach, was sustained, where it appeared a former tenant of the landlord held over at the expiration of his term and thus prevented the entry of the lessee therein. Such, indeed, were the facts of the English case of *Coe v. Clay*, 5 Bing, 440, the rule of which was adopted and approved by our own Supreme Court in *Hughes v. Hood*.

But cases of that character are to be distinguished from this one, for here all of the evidence concedes that the premises were open and ready for entry at the beginning of the term, and the lessee was prevented from enjoying them by the act of an entire stranger, over whom the lessor had no control. It is true the term of the lease was to commence—that is for the payment of rental—on the 15th day of February, 1910, but by agreement of the parties, plaintiff was entitled to enter on any day theretofore, after February 4, on which the contract was made, that he might choose to do so. The evidence is conclusive, and the case concedes, that plaintiff elected to move in and to take possession on Saturday, the 7th or 8th day of February, and went about so doing by actually



installing two loads of furniture in the premises and attempting to install the third. He and those representing him had possession of the key at the time as well. Therefore, the case is to be viewed as if the right of possession in the lessor had ceased, under the terms of the lease, and the right of entry on the part of the lessee attached, for, indeed, he had entered through removing his goods thereto and was in possession at the time. This being true, the covenant of the landlord must be regarded as having been kept intact and no breach appears which may be attributed to him.

The implied covenant of the lessor under consideration extends no further than to guarantee that he had authority to make the lease and that the premises should be open for occupancy when the contract gave to the lessee the right to enter. [See *King v. Reynolds*, 67 Ala. 229, 234, 24 Cyc. 1050, 1051.] Therefore, the distinction between cases casting liability on the lessor for his failure to give possession of the premises under the lease is to be taken with respect to the time the right of the lessor over the possession ceases and that of the lessee begins. If it appears, as in *Hughes v. Hood*, *supra*, that some one was occupying the premises at the time the lessee's right of entry accrues and he is prevented because of that fact from entering, then liability is entailed on the lessor for the breach. But, on the other hand, if the premises are open for entry at the time the right of the lessee to enter accrues under the lease, the covenant is fulfilled and a subsequent impediment offered by a stranger is regarded as a trespass against the rights of the lessee and no liability is entailed on the part of the lessor because of it. [See *King v. Reynolds*, 67 Ala. 229.]

It is certainly true that the implied covenant alone, without more, does not impose upon the lessor the obligation to physically place the lessee in posses-

sion of the premises. It is enough if the premises are open for occupancy at the time the right of the lessee to enter accrues. [See *Brouder v. Edmondson*, 7 Ga. App. 843; *Podalsky v. Ireland*, 121 N. Y. Supp. 950, 24 Cyc. 951.] Here, as before stated, the evidence is conclusive, and the case concedes, that the premises were open for occupancy at the time plaintiff's right thereto accrued, and he was prevented from enjoying them through no fault of the lessor, but rather because of the act of a stranger. Therefore, the damages sued for do not flow from a breach of the implied covenant in the lease, but rather from the act of the police officer, who prevented him from enjoying the premises. There was no duty on the part of the lessor to restrain them as the interference occurred after his obligation was fulfilled and the trespass was one against the estate of the plaintiff.

There can be no doubt of the right of the lessor to retain the \$150 rent paid under the lease, for such right accrues to him through the contract and not at all from the fact of occupancy, unless it be in the case of a common-law tenancy at will, where rent becomes due only in consequence of occupation. [See *Taylor's Landlord & Tenant* ( 9 Ed.), section 15; and *Forder v. Davis*, 38 Mo. 107.] Here the contract of lease expressly stipulated for the payment of \$150 as above stated, and it appearing that defendant in nowise breached his covenant, of course, the amount may not be recovered from him.

The judgment should be reversed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

JOHN COONEY, Respondent, v. LACLEDE GAS  
LIGHT COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted November  
5, 1914. Opinion Filed December 8, 1914.

1. **MASTER AND SERVANT: Safe Place to Work: Hazardous Employment.** The duty of the master to furnish his servant a reasonably safe place in which to work does not require him to provide against hazards such as are ordinarily incident to the employment, as where the danger is temporary and arises from the hazard and progress of the work itself; and this rule is particularly applicable to dangers arising out of the demolition of structures.
2. **———: Injury to Servant: Safe Place to Work: Sufficiency of Evidence.** In an action for injuries to an employee engaged in demolishing a platform, caused by his stepping on a plank on the platform, fastened to a joist only by a cleat, which gave way beneath him, *held* that, in view of the fact that the section of the platform where plaintiff was injured was not being demolished at the time and that the plank had not been rendered unsafe by any act connected with the demolition, it was not plaintiff's duty to make a careful inspection of the platform, but he had a right to assume that it was reasonably safe, from the fact that he was ordered to work upon it; *held, further*, in view of these facts, that the duty rested upon the master to see that the platform was reasonably safe, and the evidence disclosing that a slight inspection would have disclosed that the plank was unsafe, the case was one for the jury.
3. **———: ———: ———: Instructions.** In an action for injuries to an employee engaged in demolishing a platform, caused by his stepping on a plank of the platform, fastened to a joist only by a cleat, which gave way beneath him, an instruction that plaintiff could recover if defendant knew, or by ordinary care could have known, of the condition of the plank, and if plaintiff did not know, or by ordinary care could not have known, that the plank was not supported by a cross plank and was unsecurely fastened by cleats, was not vulnerable to the objection that it erroneously allowed a recovery for the failure to inspect a structure that was in the process of demolition, since, at the time plaintiff was injured, he was not tearing down the part of the platform where he was injured, but was using it in the course of his employment, under the assumption that it was reasonably safe.

## Cooney v. Gas Light Co.

4. ———: ———: ———: **Instructions.** In an action for injuries to an employee engaged in demolishing a platform, caused by his stepping on a plank of the platform, fastened to a joist only by a cleat, which gave way beneath him, an instruction that plaintiff could recover if defendant knew, or by ordinary care could have known, of the condition of the plank, and if plaintiff did not know, or by ordinary care could not have known, that the plank was not supported by a cross plank and was unsecurely fastened by cleates, was not vulnerable to the objection that it left it to the jury to find that defendant could, and plaintiff could not, by ordinary care, have discovered the insecure plank, when there was no evidence that defendant had any superior opportunity to that of plaintiff for making the discovery, since the duty to inspect the work was on defendant, and not on plaintiff.
5. ———: ———: **Assumption of Risk.** In order to invoke assumption of the risk as a defense, in an action by a servant for personal injuries, it must appear that the risk was incident to the employment and did not arise from the master's negligence and that the servant knew of the danger that caused the injury.

Appeal from St. Louis City Circuit Court—*Hon.*  
*Daniel D. Fisher*, Judge.

**AFFIRMED.**

*Percy Werner* for appellant; *Garner W. Penney* of counsel.

(1) The court erred in refusing to direct a verdict for the defendant, and in overruling motion for new trial. (a) The duty of a master to furnish a safe place to work does not require him to provide against hazards such as are ordinarily incident to the employment, as where the danger is temporary and when it arises from the hazard and progress of the work itself. This rule is particularly applicable to dangers arising out of the demolition of structures. *Ziegenmeyer, Admr., v. Goetz Lime & Cement Co.*, 113 Mo. App. 330; *Henson v. Packing Company*, 113 Mo. App. 618, 621; *Bloomfield v. Worster Construction Co.*, 118 Mo. App. 254; *Clark v. Liston*, 54 Ill. App. 578;

Chicago Edison Co. v. Davis, 93 Ill. App. 284; Merchant v. Mickelson, 101 Ill. App. 401; Western Wrecking Co. v. O'Donnell, 101 Ill. 492; Chicago & Marion Coal Co. v. Reese, 126 Ill. App. 567; William Grace v. Kane, 129 Ill. App. 247; Armour v. Hahn, 111 U. S. 318; 1 Labatt, Master and Servant, sec. 259; Thompson on Negligence, sec. 3876. (b) An exception does obtain where the injured servant, engaged in such work is acting under the direct orders of a foreman, who undertakes to make it safe, in which case the servant is not bound to make inspection to determine the safety of his place of work; but the facts of this case do not bring it within the exception. Wesner v. Railroad, 163 S. W. 298; Bloomfield v. Worster Const. Co., 118 Mo. App. 254. (2) The first instruction given to the jury on behalf of the plaintiff was unwarranted by the evidence, erroneous and misleading. See authorities cited under point 1.

*John B. Dempsey* for respondent.

The court properly directed the jury, for the reason: That while it is true that an exception to the general rule requiring the master to provide his servant with a safe place to work, arises, "Where the danger is temporary, and when it arises from the hazards in the progress of the work itself," and that the rule, as modified, "is particularly applicable to dangers arising out of the demolition of structures," yet we have no such case here. We have here no state of facts to which the following definition will apply: "The rule of safe place does not apply to a wrecking job, for the reason that under the conditions of tearing down, the work itself renders unsafe a place otherwise safe." Bloomfield v. Worster Construction Co., 118 Mo. App. 254. For in the labor of making a safe place one of unsafety, there is essentially a hazard incident thereto which the servant assumes. Work which in its

nature for the time being renders the place of performance to some extent insecure, justifies the exception to the rule of safe place. *Supra*, 258; *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 297; *Gulf, Etc., v. Jackson*, 65 Fed. 48-50; *Bradley v. Railroad*, 138 Mo. App. 302; *Clark et al. v. Liston*, 54 Ill. App. 576; *Grace Co. v. Kane*, 129 Ill. App. 247; *Trulayson v. Utica Mining & Milling Co.*, 67 Fed. 507.

REYNOLDS, P. J.—This is an action by the plaintiff to recover damages for injuries alleged to have been sustained by him while engaged in tearing down a platform upon the order of a representative of defendant, the particular work in which plaintiff was engaged at the time being the removal of the floor and footwalk from the platform, which had been used for holding coal as it was unloaded from cars. It is charged that while plaintiff was engaged in removing the planks comprising the platform, and while he was carrying a heavy plank which he was about to lower to the ground, he stepped upon a plank of the platform and the plank gave way, by reason of that plank not reaching the joist on the outside of the supporting posts and there being no joists on the inside of the posts; that this short plank did not have any support save cleats nailed underneath it and to the plank next to it, and was not strong enough by reason thereof to support the weight of plaintiff with the plank he was at the time carrying. It is averred that defendant was negligent in that it knew, or by the exercise of ordinary care could have known, that the joist above described was not in place to support the end of the plank, and that in consequence thereof the short plank was without adequate support for the load which plaintiff placed upon it, and that the platform was not a reasonably safe place for plaintiff to work. It is further averred that by reason of the negligence of defendant as above set forth and of the unsafe condition

of the platform or walk when he stepped upon the plank, it gave way with his weight and the added weight of the load he carried, and that plaintiff was precipitated to the ground, injuring him as described, so that for more than two months following the fall he suffered a partial paralysis of the hand and arm and was unable to hold or lift anything, and has been unable to follow his usual or any vocation, has lost wages as a laborer, will be unable to perform labor in the future, has expended and become obligated for large sums of money for medical and surgical attendance and medicines, and is permanently injured and has suffered and will suffer in the future great pain of body and anguish of mind, to his damage, etc.

The amended answer, admitting the incorporation of the defendant and that it was engaged in business as alleged, and denying every other allegation in the petition, pleads contributory negligence on the part of plaintiff and assumption of risk by him.

A trial before the court and a jury resulted in a verdict for plaintiff, from which defendant, saving exceptions to the action of the court in overruling its motion for a new trial, has duly perfected its appeal to this court.

The errors assigned here are to the refusal of the court to direct a verdict for defendant, and to error in the first instruction given on behalf of plaintiff, it being claimed that the latter was unwarranted by the evidence and was erroneous and misleading.

There was evidence tending to prove that plaintiff, a common laborer in the employ of defendant, was working for it on its premises, along which a switch track of a railroad ran, and along which track defendant had constructed a platform on which coal delivered by car to it was unloaded. On the day of the accident the foreman came to plaintiff and told him that when he was through working at the place

where he was then engaged to "come along" with him. They went back across the west side of the railroad and were joined by another workman and went to this platform. The platform was about nine feet wide and from 100 to 120 feet long, the south end of it about twelve or fourteen feet from the ground, the north end about nine feet above the ground. The flooring of this platform consisted of heavy 2x10 boards, sixteen feet long. The foreman directed plaintiff to take all of the flooring off and to "hurry on and do it." Plaintiff, assisted by the other workman, started at the south end of the platform, working toward the north. He walked to the far end and, carrying the boards to the north end, handed them down, board by board, to the man on the ground below who was helping him. In the course of his work he had torn down the platform to within two sixteen-foot board lengths of the north end. There were about three boards lying across this north end on top of the platform. He walked out and picked up the first one, which was lying there and handed it down, then went to the second and let it down, and picked up the third, which was an oak board about eighteen feet long, walked out with that and stood with both feet on the outer plank of the platform, standing there in position to hand this board down, when the board upon which he was standing gave way under him and he was precipitated to the ground and apparently lay there unconscious for awhile. It was in evidence that the board upon which plaintiff had stepped and which had given way did not rest upon the joist at its north end and was not supported at that end by the crosspieces of the platform, but fell short of that crosspiece or joist and was supported at the end by a cleat nailed under it and to the adjoining plank, and that the weight of plaintiff, with the added weight of the plank he was carrying, had caused the nails in the cleat to give way, the cleat



parted from the board, and so it fell, carrying plaintiff with it. This is a brief but, as we think, a fair statement of the accident.

Plaintiff testified that he had no knowledge whatever of the manner in which this particular plank was supported, did not know that it was only supported by this cleat and that the end of it did not rest on anything; and in point of fact, he testified that he had not made any examination of the platform but had worked where he was told by the foreman to work. This was practically the evidence given by plaintiff, he being corroborated in it by the man who was working with him at the time. In addition to this there was testimony as to the nature and extent of his injuries, expenditures, etc.

At the conclusion of plaintiff's evidence, defendant moved for a directed verdict. This the court refused, defendant excepting.

On its part, the testimony of defendant, being that of the foreman, was to the effect that the foreman had left to the plaintiff the detail of the work; had not told him to go up on the platform; that he could have done the work just as well from under it as to have gone on top of it, and that the foreman had no knowledge of the manner in which this board was fastened, had no knowledge of the fact that its end, instead of resting on joists or crosspieces, was supported merely by cleats or a cleat to another board or plank adjoining it.

At the conclusion of the testimony defendant renewed its demurrer, which was overruled.

At the instance of plaintiff the court gave an instruction, the only part of which now complained of is here underscored and is to the effect that if the jury found from the evidence that while plaintiff was engaged in removing the floor planks, he stepped upon a plank in the floor; that said plank was not supported at the end near where plaintiff stepped thereon by

a cross plank nailed to the upright posts forming the frame work of the platform, or that the fastening of that floor plank to the next floor board by cleats, if the jury found that it was so fastened, was not sufficiently secure to bear plaintiff's weight while discharging his duties as directed; that defendant, by its agents, foremen or overseers, knew, or by the exercise of ordinary care for the safety of its employees, could have known the condition of the floor and supports. "And if you further find and believe from the evidence, that plaintiff did not know, or that by the exercise of ordinary care he could not know that the said floor plank was not supported by a cross plank and that the said plank was insecurely fastened by cleats," etc., then plaintiff is entitled to recover, unless, under other instructions given, the jury find for defendant.

At the instance of plaintiff the court also instructed the jury as to the measure of damages.

At the instance of defendant it gave two instructions, one to the effect that if the jury found from the evidence that plaintiff was directed to demolish the platform in question, and given full control of the work, to choose his own methods and his own men to help him, and that plaintiff was injured by one of the dangers incident to his employment in wrecking the platform, their verdict should be for defendant; and that if the jury found from the evidence that plaintiff sustained the injuries of which he complains by reason of his own negligence directly contributing thereto, in getting upon, or standing upon, one of the planks of the platform which he was engaged in wrecking, if the jury find from the evidence that he was so engaged, because the plank had no sufficient support or underpinning at the time, and the absence of such support or underpinning he might, by the exercise of ordinary care for his own safety, have known, and by

the exercise of such care have avoided the injury, their verdict should be for defendant.

The court of its own motion instructed the jury as to the meaning of ordinary care and as to the number of jurors necessary to concur in a verdict. It refused instructions asked by defendant in the nature of demurrers to the evidence as also one which is to the effect "that the law which requires a master to furnish his servant a safe place in which to work does not require the master to make a structure which is in process of demolition or destruction safe."

Considering the first proposition made by the learned counsel, that there is no evidence in the case warranting its submission to the jury, we cannot agree to its correctness. It is true that the duty of the master to furnish a reasonably safe place to work does not require him to provide against hazards such as are ordinarily incident to the employment, as where the danger is temporary and when it arises from the hazard and progress of the work itself, and it is true that this rule has been held as particularly applicable to dangers arising out of the demolition of structures. So this court held in *Zeigenmeyer, Admr. v. Goetz Lime & Cement Co.*, 113 Mo. App. 330, 88 S. W. 139, and *Bloomfield v. Worster Construction Co.*, 118 Mo. App. 254, 94 S. W. 304, as also the Kansas City Court of Appeals in *Henson v. Armour Packing Co.*, 113 Mo. App. 618, 88 S. W. 166. So it has been held by the courts of Illinois in cases cited by counsel, and by the Supreme Court of the United States in *Armour v. Hahn*, 111 U. S. 313. So too the text-writers hold, as see 3 *Labatt's Master & Servant* (2 Ed.), sec. 1177; 4 *Thompson on Negligence* (Ed. 1904), sec. 3876. But this rule is not applicable to the case before us. This plaintiff was not injured in consequence of a defect or imperfection or weakness in this platform which had been brought about while the platform was being torn down, or in consequence of tearing it down. The

fatal weakness in the platform was there when plaintiff commenced his work, and plaintiff was not engaged in tearing down this section of the platform; in point of fact, he had done no work in the way of demolition of that part of it; on the contrary, he was using it as a place on which to stand and over which he could walk while lowering the planks taken from other parts of the platform. Neither the plank on which he stepped nor that part of the platform had been disarranged or rendered unsafe by any act connected with the removal or tearing down of the platform. It was unsafe from defects inherent to its own manner of support and construction. It was not within the obligation of plaintiff, as an employee, to make a careful inspection of this platform upon which he was ordered to do his work. He had a right to assume that it was reasonably safe from the fact that he was ordered to work upon it, as he testifies was the case. But the duty primarily and clearly was upon the employer, through its agent who was representing it in the general supervision of this work, to see that this platform upon which its employees were required to work was reasonably safe. It is clear that even slight inspection would have shown that this plank was supported at one end only by a cleat nailed to it and the adjoining board and that its end did not rest on anything. So it would be clear that the strain of either a very heavy man or of any heavy burden, when that burden was cast upon the loose, unsupported end of this plank, would be apt to cause it to fall. Whether that was the condition was the question submitted to the jury; that there was evidence to support it is too clear for argument.

We have italicized the particular parts of the instruction given at the instance of plaintiff and on which error is now assigned. It is objected to this part of the instruction that it, in effect, tells the jury that it was the duty of defendant, by its agents, fore-

men or overseers, to have inspected the old platform which was to be wrecked in order to discover the loose or insufficiently supported boards, if they could have been discovered by the exercise of ordinary care. It is said that this is not the law, *Bloomfield v. Worster Construction Co.*, *supra*, being cited in support of this and as holding that where the work is hazardous and the master undertakes to make it reasonably safe in a manner not under the control of the servant, then it becomes the master's duty to use ordinary care in that behalf, otherwise not. It is further said that it is not charged, nor is there the slightest pretense in the evidence that defendant interfered in any way with the work, or that plaintiff was in any way induced to rely on, or that he did in fact rely on, defendant or its supervisor to avoid any of the dangers which might beset the work; that the work here done could not be said to be even hazardous and that under the facts of this case no such duty rested on defendant to search out loose boards, as this instruction told the jury existed, and for this reason it is claimed the instruction is erroneous. We do not put that construction upon it. All that this instruction tells the jury is, that the duty of the employer is to furnish a reasonably safe place for its employees to do this work. There does not appear to have been anything extra hazardous about this particular piece of work, nothing to show that the platform was being pulled down because it was insecure, but, so far as the evidence shows, it was simply being removed in the ordinary course of defendant's business. Why this was so, does not appear and no suggestion arises from the testimony that the work upon which plaintiff was engaged was in any way hazardous. Whatever hazard might have occurred in the mere fact of tearing down the structure has no bearing here, because at the time, and when plaintiff was injured, and at the place where he was injured, he was not tearing down this platform

but was using it, as he had a right to do, in the course of his work, under the assumption that it was reasonably safe for the work he was engaged in.

The second objection urged to this instruction is that the court leaves it to the jury to find that defendant could and plaintiff could not, by the exercise of ordinary care, have discovered the unsupported floor plank. It is claimed that under the evidence this was unwarranted and that there is not the slightest evidence that anybody connected with the defendant had any opportunity superior to that of plaintiff for making the discovery. The trouble with this contention is that the duty to inspect the work and to see that it was reasonably safe was on defendant, not on plaintiff. We do not think that this instruction is subject to the criticism made on it, and considering it in connection with the instructions the court gave at the instance of defendant, we think that the case was properly submitted and that it was clearly a case for the jury.

It is said by counsel for appellant, "If under the facts of this case plaintiff did not assume the risk of the very mishap from which he suffered, then in our humble opinion, the old doctrine of assumption of the ordinary risks incident to a particular service, must be rooted out of our law and a new one of insurance against injury must be substituted by our courts for it."

Counsel is unduly alarmed. It is true that the doctrine of assumption of risk has been very much limited in its application by our Supreme Court, but as pointed out by Judge FARIS, in *Patrum v. St. Louis & S. F. R. Co.*, 259 Mo. 109, 168 S. W. 622, under the name of contributory negligence, it is still recognized as in force. But it has no application here. To invoke assumption of risk as against the claim of this injured employee, it must appear that the risk was one incident to the employment and which did not arise from the employer's negligence. Absent that, there is no

assumption. Here there was no knowledge on the part of the plaintiff of the hidden danger and hence no assumption of risk.

Finding no reversible error, the judgment of the circuit court is affirmed. *Nortoni and Allen, JJ.*, concur.

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MARY DODT, Respondent, v. PRUDENTIAL  
INSURANCE COMPANY OF AMERICA,  
Appellant.

St. Louis Court of Appeals. Argued and Submitted November 5, 1914. Opinion Filed December 8, 1914.

1. **LIFE INSURANCE: Payment of Less Than Due: Right to Recover Balance.** A payment by an insurer to a beneficiary of a less amount than was due under a life insurance policy, when the beneficiary had not commenced or threatened litigation and had not even made any demand for payment, and the payment was not made by way of compromise, did not deprive the beneficiary of the right to recover the full amount due under the policy.
2. ———: **Effect of Misrepresentations: Statute Construed.** The word "misrepresentation" in Sec. 6937, R. S. 1909, which provides that no misrepresentation made in obtaining a life insurance policy shall be deemed material or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event upon which the policy is to become due, includes warranties.
3. ———: ———. A life insurance policy which provides that if insured is not in sound health on the date of the policy, insurer's liability is limited to the return of the premiums paid, is governed by Sec. 6937, R. S. 1909, and hence insurer can not defeat a recovery on the ground that insured misrepresented the condition of his health, unless the condition of his health at the time of such alleged misrepresentation contributed to his death.
4. **DAMAGES: Measure of Damages: Instructions.** An instruction which merely charges the jury as to the measure of damages they are to apply in case they find a verdict for plaintiff,

is not defective because it does not cover all the issues, including the defenses.

5. **LIFE INSURANCE: Vexatious Refusal to Pay: Damages.** In an action on a life insurance company, evidence *held* to justify an allowance of damages and attorney's fees, under Sec. 7068, R. S. 1909, for vexatious refusal to pay.

Appeal from St. Louis City Circuit Court.—*Hon. George C. Hitchcock*, Judge.

**AFFIRMED.**

*Fordyce, Holliday & White* for appellant.

(1) The court erred in overruling defendant's demurrer to the evidence at the close of plaintiff's testimony, because plaintiff admitted that the defendant carried out its contract with her. Bishop on Contracts, sections, 779, 781-784; 7 Am. & Eng. Ency. of Law (2 Ed.), p. 125 (e); 9 Cyc. 647 (e); Collins v. Whigham, 58 Ala. 438; Boniol v. Henaire, 10 Mart. (O. S.) 357; Twaits v. Penna. R. Co., 75 A. 1010; Kolachny v. Galbreath, 26 Okl. 772; Frank Oil Co. v. Belleview Gas & Oil Co., 119 p. 260; Laughlin v. U. S. Rolling Stock Co., 64 F. 25; Ramsey v. Waltham, 1 Mo. 395. (2) The court erred in overruling defendant's demurrer to the evidence at the close of defendant's testimony, because all the testimony in the case showed that defendant had in good faith carried out its contract with plaintiff. Authorities under point 1. (3) The court erred in giving plaintiff's instruction because it did not cover the question of whether defendant had performed its contract or not. Clark v. Hammerle, 27 Mo. 55; Hoffman v. Parry, 23 Mo. App. 20; Martin v. Johnson, 23 Mo. App. 96; Hayner v. Churchill 29 Mo. App. 676; Willmott v. Railroad, 106 Mo. 535; Holladay-Klatz Land & Lumber Co. v. T. J. Moss Tie Co., 87 Mo. App. 167; Griffith v. Conway, 45 Mo. App. 574; Carroll v. Rail-



road, 60 Mo. App. 465; Walker v. Phoenix Ins. Co., 62 Mo. App. 209; Mallmann v. Harris, 65 Mo. App. 127; Laughlin v. Gerardi, 67 Mo. App. 372; Link v. Westerman, 80 Mo. App. 592; Austin v. St. Louis Transit Co., 115 Mo. App. 146; Zeis v. St. Louis Brewing Ass'n, 205 Mo. 638; Cytron v. St. Louis Transit Co., 205 Mo. 692; Flaherty v. St. Louis Transit Co., 207 Mo. 318; State ex rel. Shipman v. Allen, 124 Mo. App. 465; Trimble v. Moore, 125 Mo. App. 601; Warrington v. Kallaner, 135 Mo. App. 5; Packing Co. v. Mertens, 150 Mo. App. 583. (4) The court erred in allowing plaintiff to recover punitive damages, because the question presented in this case is an entirely new question involving the construction of a clause in an insurance policy that has never been construed by the courts of this State and which defendant had a right to have tried out without being subjected to any penalty. Rogers v. Insurance Co., 157 Mo. App. 671. Renfro v. Insurance Co., 148 Mo. App. 258.

*James J. O'Donohoe* for respondent.

(1) That part of the policy limiting the appellant's liability to a return of the premiums paid thereon is invalid because contravening the misrepresentation statute. Section 6937, R. S. Mo. 1909; Buchholz v. Ins. Co., 177 Mo. App. 683; Roedel v. Ins. Co., 176 Mo. App. 584; Coscarella v. Ins. Co., 175 Mo. App. 130; Ins. Co. v. Stiewing, 173 Mo. App. 108; Welsh v. Ins. Co., 165 Mo. App. 233; Frazier v. Ins. Co., 161 Mo. App. 709; Lynch v. Ins. Co., 150 Mo. App. 461; Salts v. Ins. Co., 140 Mo. App. 142; Burns v. Ins. Co., 141 Mo. App. 212; Burrridge v. Ins. Co., 211 Mo. 158; Williams v. Ins. Co., 73 Mo. App. 612; Kern v. Legion of Honor, 167 Mo. 471; Keller v. Ins. Co., 58 Mo. App. 557; Whitfield v. Ins. Co., 205 U. S. 489; Ins. Co. v. Coleman, 58 Ga. 251; Ins. Co. v. Leslie, 47 Ohio St. 409; King Brick Mfg. Co. v. Ins. Co., 164 Mass. 291;

Emery v. Ins. Co., 52 Me. 322; Day v. Ins. Co., 81 Me. 244. Warranties have been abolished in this State. Sec. 6937, R. S. Mo. 1909; Ashford v. Ins. Co., 98 Mo. App. 505; Jacobs v. Life Assn., 146 Mo. 523; Aloe v. Life Assn., 164 Mo. 675; Sheurmann v. Ins. Co., 165 Mo. 641; Jenkins v. Ins. Co., 171 Mo. 383. Stipulations inserted in policies to evade statutes and to modify liability are uniformly condemned. Harms v. Casualty Co., 172 Mo. App. 241; Burrige v. Ins. Co., 211 Mo. 158; Karnes v. Ins. Co., 144 Mo. 413; Williams v. Ins. Co., 73 Mo. App. 612; Keller v. Ins. Co., 58 Mo. App. 557; Price v. Ins. Co., 48 Mo. App. 281. (2) Where the amount is fixed or liquidated the payment of a sum less than the amount due does not deprive the beneficiary of a right to prosecute a suit for the residue. Harms v. Casualty Co., 172 Mo. App. 241; Bidlecom v. Assurance Co., 167 Mo. App. 581; Head v. Ins. Co., 241 Mo. 403; Hanson v. Crawford, 130 Mo. App. 232; Goodson v. Nat. Masonic Accident Assn., 91 Mo. App. 339; Jenkins v. Ins. Co., 79 Mo. App. 55. (3) Respondent's viewpoint was and now is that there was no issue to be submitted to the jury beyond the questions of damages and attorney's fee, and plaintiff's instruction covered the same. But if plaintiff's instruction was insufficient, it was the duty of defendant to request further instructions covering the whole case, and failing to do so, it cannot complain of the insufficiency of plaintiff's. Knight v. Kansas City, 138 Mo. App. 153; Ghery v. Zey, 128 Mo. App. 362; Fisher v. Railroad, 198 Mo. 562; Carpenter v. Hamilton, 185 Mo. 603. Plaintiff's instruction is not erroneous, even if designed to cover the whole case, because it failed to include the defenses. Meily v. Railroad, 215 Mo. 567. Mere nondirection is not reversible error. Morgan v. Mulhall, 214 Mo. 451. The court, at the request of appellant, submitted to the jury every conceivable issue and the finding thereupon is binding on both parties. Jones v. Brownlee, 161 Mo.

258; Horgan v. Brady, 155 Mo. 659; Dunlap v. Griffith, 146 Mo. 292; Berkson v. Railroad, 144 Mo. 220; Rear-don v. Railroad, 114 Mo. 384; Wilkins v. Railroad, 101 Mo. 105; Thorpe v. Railroad, 89 Mo. 650; Homes v. Braidwood, 82 Mo. 610. (4) There is no new question involved in this case (cases cited under point 1) and the court was bound, under the repeated rulings of the appellate courts of this State to submit the questions of damages and attorney's fees to the jury. Lehmann v. Ins. Co., 167 S. W. 1047; Stix v. Travelers' Indemnity Co., 175 Mo. App. 171; Jones v. Ins. Co., 173 Mo. App. 1; Troll v. Ins. Co., 172 Mo. App. 12; Cox v. Ins. Co., 154 Mo. App. 464; Utz v. Ins. Co., 139 Mo. App. 153; Kellogg v. Ins. Co., 133 Mo. App. 391.

REYNOLDS, P. J.—Plaintiff instituted this action before a justice of the peace, filing a statement in which he claimed that, under a policy issued by the defendant company, of date Sept. 5, 1910, it had insured Joseph Dodt, her husband, promising to pay in case of his death six months after the date of the policy, the sum of \$153 or, if he died within six months after the date of the policy, only half of the face of the policy, to-wit, \$76.50. Averring that the insured died on or about February 23, 1911; that plaintiff was his wife and is now his widow; that he was insured and carried this policy in the defendant company at the date of his death and had complied with all the conditions and provisions of the policy to be performed by him; that after his death plaintiff had notified defendant thereof and furnished it with due proofs of death and demanded payment of one-half the face of the policy, but that defendant had vexatiously refused to pay it and disclaimed all liability thereunder, judgment is prayed for \$76.50, less 3.90, and interest thereon at six per cent per annum, together with ten per cent thereon as damages, and a reasonable attorney's fee for vexatious refusal to pay the amount

of the policy and for costs. From a judgment in favor of plaintiff before the justice, defendant took an appeal to the circuit court, where the case was tried before the court and a jury.

There was no question as to the issue of the policy, its date and amount, nor as to the fact of the death of the insured within six months of the date of the policy, nor as to the fact that plaintiff is his widow. The defense relied upon rests upon one of the provisions in the policy called "first preliminary provision," which reads: "The company's liability under this policy shall be limited to a return of the premiums paid hereon if the insured die before the date hereof, or if on said date the insured be not in sound health." It is in evidence that shortly after the death of the insured an agent of the defendant company called upon plaintiff and represented to her that he had ascertained that her husband was not in good health at the time the policy was issued to him, and that under this provision of the policy the company's only liability was for the return of the premiums paid thereon; that these amounted to \$3.90, which amount the agent paid plaintiff by check, taking her receipt therefor as in release of all claims under the policy.

The testimony of plaintiff was to the effect that her husband had died of heart disease, he being confined to his bed from December 24, 1910, to the time of his death. The testimony on the part of defendant was to the effect that the insured had not been "in good health" for some time prior to the issuing of the policy. Under what particular form of ill health the insured was suffering was not in evidence, and there is no evidence in the case that his condition of health at the time the policy was issued to him was of such a character that it actually contributed to his death.

If the receipt or release, in part relied upon, is valid, then plaintiff has no case. The effect of the payment of \$3.90 depends upon the question as to whether

this policy, as interpreted by its terms and under our law, is one calling for the payment of one-half the face of the policy, as claimed, to-wit, the sum of \$76.50, or merely for the return of the premiums paid and interest, which it appears amounted to \$3.90. Some effort is made on the part of defendant's counsel to show that this \$3.90 was paid and received by way of compromise of a disputed claim. The evidence, however, does not bear out this contention, and so the jury must have found. It is very specific, to the effect that defendant's agent went to plaintiff and told her that he had ascertained that her husband was not in good health at the time he took out the policy and that under the terms of the policy all that she could recover would be \$3.90. Plaintiff says that at the time she was in much distress and relied upon what defendant's agent told her and on the faith of that had accepted the money and signed the release, further testifying that this agent had told her that in point of fact the company owed her nothing, but that they would pay her this \$3.90 "out of pity." This latter statement, however, is denied by the agent. However that may be, it cannot be said that this was paid by way of compromise, or to settle the pending litigation. There is no evidence that at that time plaintiff had either commenced or threatened any litigation, or in fact had made any demand on the company for the payment of any sum. If in point of fact it was not true that under the contract \$3.90 only was due upon it and that the full face of the policy was due, then it is the well-settled law of this State that the payment or tender under the policy of a sum less than the full amount of the sum due, does not deprive the beneficiary of a right to prosecute a suit for the entire amount. *Head v. New York Life Ins. Co.*, 241 Mo. 403, 147 S. W. 827; *Biddlecom v. General Accident Assur. Co.*, 167 Mo. App. 581, 152 S.W.103, and *Harms v. Fidelity & Casualty Company of New York*, 172 Mo.

App. 241, 157 S. W. 1046, are ample authority for this. These cases contain such a full discussion of the proposition that it is unnecessary to cite others.

That brings us to the real contention of learned counsel for appellant and to which they direct the consideration of the court. That is, whether in the light of section 6937, Revised Statutes 1909, the company can limit its liability to a return of the premiums paid on the policy, if at the date thereof the insured was not "in sound health." Section 6937 of our statute provides: "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this State, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury." This section of our statute has frequently been before our courts, both the Supreme Court and the Courts of Appeals, and its meaning is so well settled that it does not seem to call for further discussion.

Our Supreme Court, in *Jenkins v. Covenant Mut. Life Ins. Co.*, 171 Mo. 375, l. c. 382, 71 S. W. 688, has ruled that the word "misrepresentation," as used in that section includes warranties. This was reiterated in *Mathews v. Modern Woodmen of America*, 236 Mo. 326, l. c. 347, 139 S. W. 151. That same rule of interpretation has been followed and enforced by our Courts of Appeals in many cases, as see *Metropolitan Life Ins. Co. v. Stiewing*, 173 Mo. App. 108, 155 S. W. 900; *Coscarella v. Metropolitan Life Ins. Co.*, 175 Mo. App. 130, 157 S. W. 873; *Roedel v. John Hancock Mut. Life Ins. Co.*, 177 Mo. App. 683, 160 S. W. 573.

But it is said by learned counsel for appellant that this condition in this policy presents a new phase of this question, or presents the question of the construction and application of section 6937 in a new and dif-

ferent light, counsel claiming that this condition in the policy before us is written under and in compliance with section 6973. We accept the statement of counsel that this provision was inserted in good faith, and in an attempt to obey and comply with the law, but we can come to no conclusion other than that its effect, if sustained, would be a successful evasion of the provisions of section 6937 of our statute. We hold that it is no more effective than the attempts made by insurance companies to evade the section of our statutes which eliminates suicide as a defense by providing that in cases of suicide a less amount than the face of the policy shall be paid. All such attempts have proved abortive when brought before the courts. We have reviewed the authorities so fully on this proposition in the case of *Applegate v. Travelers Ins. Co.*, 153 Mo. App. 63, 132 S. W. 2, that it is unnecessary to enter into a discussion of it or of citation of authorities here.

As noted in the *Applegate* case, Mr. Justice HARLAN, speaking for the Supreme Court of the United States, followed the decision of our court in *Keller v. Travelers Ins. Co.*, 58 Mo. App. 557, and of our Supreme Court in *Logan v. Fidelity & Casualty Co.*, 146 Mo. 114, 47 S. W. 948. [See *Whitfield v. Aetna Ins. Co.*, 205 U. S. 489.]

In like manner our court, in *Williams v. Bankers & Merchants' T. M. F. Ins. Co.*, 73 Mo. App. 607, condemned an attempt to evade what is now section 7020, Revised Statutes 1909, the valued policy law of our State.

Our conclusion upon this branch of the case is, that notwithstanding this first clause the provision of the contract in the policy of the defendant company, the nonforfeiture clause of our statute governs, and that unless it appeared by the evidence and to the satisfaction of the jury, that the condition of health of the insured was such at the time of taking out the in-

surance that it contributed to his death, then defendant is liable.

That question was submitted to the jury in this case in the strongest possible language by instructions given at the instance of defendant. Thus, by one instruction the jury were told that under the terms of the policy the company's liability was limited to the return of the premiums paid thereon, if the insured was not in sound health on the date of the policy, and if the jury believed and found from the evidence that at the date of the issue of the policy the insured was not in sound health and that he died on a subsequent day, and that on that day premiums amounting to \$3.90 had been paid under said policy, and that thereafter plaintiff made claim for the proceeds of the policy but that defendant denied liability on the policy, other than for the return of the premiums because the insured was not in sound health on the date of the issue of the policy, and that defendant thereafter paid the sum of \$3.90 to plaintiff and plaintiff accepted it, their verdict must be for defendant. The jury were further told, at the instance of defendant, that if they believed from the evidence that after the death of the insured, plaintiff made claim upon the policy of insurance and that thereupon a controversy in good faith arose and existed between plaintiff and defendant as to defendant's liability under the policy, and that thereafter defendant in good faith paid to plaintiff the sum of \$3.90 and plaintiff accepted that sum in compromise of the controversy and in discharge of any liability under the policy, their verdict must be for defendant. At the instance of defendant the court further instructed the jury that the burden of proof was on plaintiff to establish by a preponderance of the evidence the facts necessary to a verdict in her favor under these instructions but that if plaintiff had not so established her case, or if the evidence was evenly



balanced so that the jury were in doubt and unable to say on which side is the preponderance, or if the preponderance is in favor of defendant, in either of these cases their verdict must be for defendant. Surely defendant has no cause whatever to complain of these instructions. We recite them without in any manner endorsing them as correct propositions of law.

Complaint is made that the instruction given at the instance of plaintiff is fatally defective in that it does not embrace all the issues and does not cover the defense put up. That instruction did not purport to be on the merits of the case in any way whatever; it was simply a direction, and a correct one, on the measure of damages in case there was a verdict returned for plaintiff, so that the rule invoked by counsel for defendant does not apply.

Complaint is made of the allowance for damages for vexatious refusal to pay. That is so much a question for the jury, both as to amount of counsel fee and as to the fact of the delay being vexatious and so bringing it within the provisions of section 7068, that we do not think it a case for our interference. Beyond doubt the company defendant had no intention whatever of paying more than the premiums and interest on them and intended resisting any claim that plaintiff might make for any amount above that. There was evidence as to the value of the services of an attorney in the case, from which the jury were warranted in awarding the amount which they did. The verdict credited defendant with the \$3.90 and interest thereon, which had been paid her by defendant, so we cannot say it is excessive or evidence prejudice.

We discover no reversible error. The judgment of the circuit court is affirmed. *Nortoni and Allen, JJ.*, concur.

THEODORE JENNEMANN, Respondent, v. JOHN  
BUCHER, Appellant.

St. Louis Court of Appeals. Argued and Submitted November  
3, 1914. Opinion Filed December 8, 1914.

1. **APPELLATE PRACTICE: Conclusiveness of Findings.** In an action at law tried to the court, the question of where lies the preponderance of the evidence is for the sole determination of the trial court, and its finding is conclusive, on appeal, if sustained by substantial evidence.
2. ———: **Trial Practice: Leading Questions: Review.** The trial court may, in its discretion, allow leading questions to be propounded to a witness, and such discretion will not be interfered with, on appeal, unless it has been flagrantly abused and the party objecting has suffered injury therefrom.
3. ———: **Exclusion of Evidence: Review.** In order to warrant the review, on appeal, of a ruling by the trial court excluding evidence, such evidence, or its substance, must be preserved in the record.
4. ———: **Presumption of Correct Action by Trial Court.** In the absence of a showing to the contrary, the presumption is always in favor of correct action on the part of the trial court.
5. **MONEY HAD AND RECEIVED: Overpayment Through Mistake: Evidence.** In an action by one of two stockholders of a corporation, who bought the shares of the other stockholder, to recover an overpayment made to the seller, in arriving at the valuation of the stock, caused by adding to one-half of the value of the merchandise on hand the whole of the outstanding accounts receivable, instead of one-half thereof, *held* that a certified copy of the report of the corporation, made by plaintiff as president prior to the sale and filed in the office of the Secretary of State, had no tendency to show the value placed upon the stock by plaintiff at the time he made it, and hence was inadmissible for that purpose.
6. **PLEADING: Construction of Petition After Judgment.** A petition must be liberally construed after judgment, so as to support the judgment.
7. **MONEY HAD AND RECEIVED: Pleading: Overpayment Through Mistake: Sufficiency of Petition.** The petition, in an action for money had and received, alleged that defendant, one of the two stockholders of a corporation, entered into a con-

tract with plaintiff, the other stockholder, whereby defendant agreed to sell to plaintiff all of his stock, at and for its book value, which was then and there ascertained and agreed between plaintiff and defendant to amount to the sum of \$3361.31, and that, upon the delivery of the stock, plaintiff paid to defendant "through a mistake and error on his part, the sum of \$4334.81 as payment in full for said shares, instead of the said agreed sum of \$3361.31, whereby plaintiff, by reason of said error and mistake, paid to said defendant the sum of \$973.50 in excess of the sum agreed to be paid for said shares of stock," and that plaintiff demanded repayment of such sum as soon as he discovered the error, but defendant refused to refund. *Held*, that the petition, when liberally construed, as it must be after judgment, states a cause of action for money had and received; an averment of a promise to pay being immaterial, as, under the facts pleaded, the law implies that promise.

8. ———: Overpayment Through Mistake: Evidence. In an action by one of two stockholders of a corporation, who bought the shares of the other stockholder, to recover an overpayment made to the seller, in arriving at the valuation of the stock, caused by adding to one-half of the valuation of the merchandise on hand the whole of the outstanding accounts receivable, instead of one-half thereof, where the seller defended on the ground that the transaction was closed, evidence offered by him to the effect that the value of the good will was not figured in the sale, as it should have been, was properly excluded, as being irrelevant to the issues.
9. ———: ———: Pleading: Waiver of Defects: Appellate Practice. A petition, in an action for money had and received, based on an overpayment through mistake, which alleged that the mistake was made by plaintiff, was not open to objection, after judgment, on the ground that it was insufficient because it did not allege that the mistake was mutual, where the case was tried on the theory that the question of whether there had been a mutual mistake was the controlling issue.
10. ———: ———: Evidence: Book Value of Corporate Stock. In an action by one of two stockholders of a corporation, who bought the shares of the other stockholder, to recover an overpayment made to the seller, in arriving at the valuation of the stock, caused by adding to one-half of the value of the merchandise on hand the whole of the outstanding accounts receivable, instead of one-half thereof, *held* that a valuation on the invoice value of the assets would be considered the "book value" of the stock, no other value being given, within an allegation of the petition that the stock was sold at its "book value," although such invoice value was not formally carried on the books of the corporation.

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11. ———: ———: Sufficiency of Evidence. In an action by one of two stockholders of a corporation, who bought the shares of the other stockholder, to recover an overpayment made to the seller, in arriving at the valuation of the stock, caused by adding to one-half of the value of the merchandise on hand the whole of the outstanding accounts receivable, instead of one-half thereof, evidence *held* to sustain a finding that plaintiff had overpaid defendant as a result of a mutual mistake, warranting a judgment in his favor.
12. NEW TRIAL: Newly Discovered Evidence: Relevancy. Newly discovered evidence is not a ground for a new trial unless it relates to the issues that were tried.

Appeal from St. Louis City Circuit Court.—*Hon.*  
*George C. Hitchcock*, Judge.

**AFFIRMED.**

*Edward A. Raithel* and *John W. Mueller* for appellant.

(1) The burden of proof was, of course, on the plaintiff; that is, it was incumbent on him to sustain the petition by a preponderance of the evidence. This, we submit, he absolutely failed to do. *Glover v. Henderson*, 120 Mo. 367. (2) The court erred in overruling objections to leading questions. *Engelking v. Railroad*, 187 Mo. 158; 1 *Redfield's Edition of Greenfield's Ev.*, 477; *State v. Whalen*, 148 Mo. 286. (3) The court erred in excluding defendant's offer of an affidavit made by the plaintiff to the Secretary of State, himself, at the very time of the statement between the parties and relating to the very subject-matter of the controversy between them, namely, the valuation put on the stock of the defendant. *Sullivan v. Railroad*, 133 Mo. 1; *State v. Macy*, 67 Mo. App. 326; *Schlicker v. Gordon*, 19 Mo. App. 479; Revised Statutes Mo. 1909, sec. 3026. (4) No averment that there was an account stated. Nor was there an averment that defendant agreed to pay, which was likewise essential. *Newberger v. Friede*, 23 Mo. App. 634; *Joyce v.*

Murnagham, 17 Mo. App. 10; McCormack v. Sawyer, 104 Mo. 43; McGuire v. De Freese, 77 Mo. App. 685; Brown v. Kimmel, 67 Mo. 430. The real value of the stock, therefore, becomes material, and in determining this, the good will should be taken into account. (5) Furthermore, we submit that there can be no recovery in this case, because there was no mutuality of mistake. The petition alleges that the mistake made was by the plaintiff, and alleges nothing to indicate that the defendant was aware of that mistake. Matthew v. City of Kansas, 80 Mo. 231; Budd v. Eyerman, 10 Mo. App. 437; Davis v. Krum, 12 Mo. App. 279; Koontz v. Central Nat'l Bank, 51 Mo. 275; Norton v. Bohart, 105 Mo. 615; Boeckler Lumber Co. v. Cherokee Realty Co., 135 Mo. App. 708, 719; Benn v. Pritchett, 163 Mo. 560. (5) There was error on the part of the trial court in refusing a new trial on the ground of newly-discovered evidence.

*E. V. P. Schneiderhahn and E. C. Slevin* for respondent.

(1) If there was substantial evidence to support the judgment this court will not interfere. Miller v. Barnett, 124 Mo. App. 53, 57; Kinlen v. Railroad, 216 Mo. 145, 176. The findings of fact made by a trial court in a law case without a jury are the equivalent of a verdict of a jury and if supported by substantial evidence must be accepted by the appellate court. Glade v. Ford, 131 Mo. App. 164, McCormick v. Moore, 134 Mo. App. 669. Preponderance of evidence has no reference to numbers, but to the credibility and weight of the evidence. Cartlich v. Railroad, 129 Mo. App. 721. (2) The trial court exercises its discretion in allowing the privilege of asking leading questions and it will not be reviewed on appeal unless it clearly appears that such discretion has been abused. Speckmann v. Kreig, 79 Mo. App. 376; Coats v. Lynch, 152

Mo. 161. (3) Books of original entries are admissible as part of the *res gestae*. Gardner v. Gas Co., 154 Mo. App. 666. (4) Where alleged incompetent evidence has been admitted over objection, a request should be made that it be stricken out. Failing to do so, the party has no cause of complaint. Adams Express Co. v. Railroad, 126 Mo. App. 471. (5) The right to recover back moneys paid by mistake is not dependent upon the knowledge, information or belief of the opposite party that the mistake has been made. Union Electric Light Co. v. Surgical Co., 122 Mo. App. 631. (6) *Assumpsit* is the proper action to recover back money paid by mistake. Hanson v. Jones, 20 Mo. App. 595; Elsworth Coal Co. v. Quade, 28 Mo. App. 421; Davis v. Krum, 12 Mo. App. 279. (7) The granting of a new trial because of newly discovered evidence rests for the most part with the trial judge and any doubt as to whether his discretion has been soundly exercised is to be resolved in his favor. Blake v. Ins. Co., 133 Mo. App. 16. (8) One asking for a new trial upon the ground of newly-discovered evidence must show that he has used due diligence and his motion must set forth the evidence. King v. Gilson, 206 Mo. 264, 279; Winn v. Grier, 217 Mo. 420, 461.

REYNOLDS, P. J.—The petition in this case charges that defendant, at a day named, was the owner of fifteen shares of the capital stock of the Jenneman-Bucher Retail Liquor Company; that on that date, defendant entered into a contract with plaintiff whereby he agreed to sell to plaintiff the fifteen shares of capital stock, “at and for its book value, which was then and there ascertained and agreed between the plaintiff and defendant to amount to the sum of three thousand, three hundred and sixty-one dollars and thirty-one cents.” Averring that defendant duly delivered and assigned these shares of stock to plaintiff, it is averred that on the day mentioned

plaintiff paid to defendant "through a mistake and error upon his part, the sum of four thousand three hundred and thirty-four dollars and eighty-one cents as payment in full for said shares, instead of the said agreed sum of three thousand three hundred and sixty-one dollars and thirty-one cents, whereby plaintiff, by reason of said error and mistake, paid to said defendant the sum of nine hundred and seventy three dollars and fifty cents in excess of the sum agreed to be paid for said shares of stock." Averring demand for repayment of this sum as soon as plaintiff discovered this error and mistake, and refusal of defendant to refund, plaintiff demands judgment for this amount with interest and costs.

The amended answer upon which the case was tried admits that, prior to the date named, defendant was the owner of fifteen shares of the stock of the company, and that on or about that date defendant delivered and assigned these shares to plaintiff and plaintiff paid defendant therefor the sum of \$4334.80. Every other allegation in the petition is denied generally.

The trial was before the court, a jury having been waived. At its conclusion the court found for plaintiff, rendering judgment for the amount claimed and interest. Filing motions for new trial and in arrest as well as amended motions, all however filed within due time, and excepting to the action of the court in overruling them, defendant has duly appealed.

There is evidence in the case tending to prove that plaintiff and defendant were doing business under the name of Jenneman-Bucher Retail Liquor Company, which was a corporation with a paid up capital of \$3000, each of the parties, plaintiff and defendant, owning fifteen shares of the total capital stock, although one share actually owned by Jenneman appears to have been in the name of his son. The defendant was the president of the concern, having

charge of its sales. Plaintiff was the secretary and treasurer and attended to the buying for the concern and apparently kept its books, looked after its accounts, was its financial manager. Difficulty having arisen between these two parties, Jenneman proposed that one or the other draw out, selling his stock, fifteen shares, to the other. For the purpose of arriving at the value of the assets of the concern, Jenneman employed a gauger to measure up the liquors in stock. He also appears to have been the active party in arriving at the value of the other articles and in stating the financial condition of the concern, but there is evidence tending to show that his figures were all submitted to defendant and gone over by both of them. The result of this was that Bucher's share, that is, the value of his fifteen shares, as evidenced by the stock on hand, was figured at \$2387.81. In addition to stock on hand it appears that there belonged to the concern evidences of debt or accounts for monies loaned out by the concern to different parties, amounting to \$1947. In arriving at the value of the interest of Bucher this whole amount of \$1947 was added to Bucher's one-half interest in the stock, etc., that is to say, added to the \$2387.81. According to this, Bucher's interest was figured at \$4334.81. It appears that Jenneman was the party who made this mistake, but it is very clear from the evidence that both parties acceded to the trade on the basis of this mistake. Having thus arrived at the value of Bucher's interest, and Bucher saying he was unable to buy out Jenneman and was willing to sell on that valuation and for that sum, Jenneman agreed to buy at those figures, that is, \$4334.81, and gave Bucher his check for that amount, which Bucher accepted and apparently cashed. Sometime afterwards plaintiff Jenneman discovered the mistake that had been made in giving Bucher credit for the whole of the money loaned out, that is, for the \$1947, instead of for only one-half of this amount, that



is to say \$973.50. It is to recover this amount as an overpayment that this action was brought.

It is earnestly insisted by counsel for appellant that the burthen of proof being upon plaintiff, it was incumbent upon him to sustain the allegations of his petition by the preponderance of the evidence, and that this, it is submitted, he has absolutely failed to do. Inasmuch as the learned trial judge, acting as trier of fact, found for plaintiff, we must assume that his finding is correct, if sustained by substantial evidence. The weight or preponderance of the evidence is for his sole determination. This disposes of the first point made by counsel for appellant.

The second point made by those counsel is on the rulings of the trial court on the evidence. The principal error upon which this rests is that the court allowed leading questions to be asked. That is so much a matter within the discretion of the trial court that, unless there is a flagrant violation of the rule against asking leading questions, and that to the injury of the party objecting we will not interfere with the exercise of that discretion. We find no such abuse of the discretion here.

Complaint is also made of the action of the trial court in excluding from evidence a certified copy from the office of the Secretary of State of the report of the Jenneman-Bucher Retail Liquor Company for the year 1908, made by plaintiff, it being stated that it was offered for the purpose of impeaching the witness in his testimony as to the value of the stock of that company. This was objected to on the ground that it was neither competent nor relevant to the issues in the cause, and the objection sustained. We might dispose of this by remarking that the certificate is not in the abstract of the record. That absent we cannot pass upon either its materiality or competency. This on the settled rule that if error is assigned to the exclusion of evidence offered, that evidence or its sub-

stance must be included in the record. All that appears as to this certificate is that it is the report of the Jenneman-Bucher Retail Liquor Company for the year 1908, made by Theodore Jenneman and was offered for the purpose of impeaching his testimony as to the value of the stock. Whether it did that, or even tended to do it, in the absence of the certificate, is a matter impossible for us to determine. The presumption always is in favor of correct action on the part of the trial judge, absent a showing to the contrary. Apart from that, under the issues made by the pleadings, we are unable to see the relevancy of the certificate as showing the value placed upon the stock by Jenneman at the time he made it.

It is further assigned as error and as a reason why the judgment in this cause should be reversed, that there is no account stated, nor any averment that defendant agreed to pay, or, more correctly speaking, to repay the money, it being here argued that the real value of the stock had become material and that error was committed in excluding testimony as to the value of the good will of the concern, as that was an asset which should have been included. We cannot agree with counsel on either of these propositions. This petition, liberally construed, as it must be after judgment in support of the judgment, is a good petition for money had and received, which *ex aequo et bono*, defendant was bound to pay back to plaintiff. The amended answer upon which the case was tried admitted the receipt of the money but denied liability to make repayment. That is all that is in the answer and that was the only issue. Here was no attempt to open up the valuation of the asset or impeach the transaction. On the contrary, defendant stood by it and insisted on it as a closed transaction. So that the value of the good will was not involved and could not enter into consideration. An averment of a promise to pay was immaterial. Under the case pleaded the law would

imply that promise, and a demand and refusal being averred, the cause of action was properly stated. This does not purport to be an action on an account stated and was not tried on any such theory.

It is further assigned by counsel for appellant that there can be no recovery in the case because there was no mutuality of mistake. It is true that the petition alleges that the mistake made was by plaintiff and that it does not allege a mutual mistake. If any objection had been made at the trial to the sufficiency of the petition on this score and that objection have been properly saved if overruled, there might be something in this point. But the case was tried on both sides on the question as to whether there had been a mutual mistake; there was evidence strongly tending to prove a mutual mistake. The finding of the trial court clearly was made on the theory of a mutual mistake, and judgment went for plaintiff. After judgment, this petition is sufficient.

But it is said that as set out in the petition the agreement was to sell the stock "at its book value," and that there is no "book value" shown. This is more a play on words, than a substantial criticism. Moreover, the evidence tends to show that the stock was purchased on what was assumed to be its invoice value—and that is its book value—no other value being given—whether formally carried on the books of the concern or not. That this value was written out in the form of account was in evidence. The schedule of accounts, properly grouped, is in the record. The mistake clearly appears, namely, that defendant was given credit and plaintiff charged with the whole of the amount of money loaned out by the concern, instead of being credited with one-half of that amount, which was all to which either was entitled. To repeat, it is clear that there is evidence justifying the finding of the court that the overpayment by plaintiff to defendant was the result of a mutual mistake. Each

of the parties was attempting to arrive at the "book value" of the assets of their concern, and the purchase and sale was to be made on that basis.

As before stated, there was an amended motion for a new trial. One of the grounds of that was that material evidence had been discovered by defendant after the end of the trial and after the finding and judgment. That newly discovered evidence, when we examine the affidavit accompanying this amended motion for new trial, is to the effect that while Jenneman was secretary and treasurer of the concern and as such in sole charge of its money transactions, he had paid out moneys of the concern for his private account, for which he should have been charged, and so the value of the stock included, it being claimed that if a new trial was granted defendant would interpose a counterclaim and introduce evidence in support thereof. The court rejected this offer and overruled the motion for new trial and, as we think, in so acting committed no error. Testimony of that kind might have been introduced under a counterclaim but there is no pretence whatever of any counterclaim being interposed here. In point of fact, as we have already stated, the answer as amended was a general denial except as to the fact of the reception of the money. At the trial defendant undertook to prove that he had sold out his stock for a lump sum, irrespective of any appraisement or valuation. This new claim, as well as that made concerning the value of the good will, was directly antagonistic to any such position. Parties are not permitted to blow hot and cold. To avail himself of newly discovered evidence it must appear that it was within the issues. We know of no case in which it has ever been held that newly discovered evidence is a ground for a new trial, when it relates to a matter not included within the issues joined and on trial before the court.

We are asked to impose ten per cent statutory damages as for a vexatious appeal. We do not think that the case warrants any such action.

Finding no reversible error, the judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.*, concur.

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ALBERT L. HERTEL, Respondent, v. WILLIAM CUBA, Appellant.

St. Louis Court of Appeals. Argued and Submitted November 2, 1914. Opinion Filed December 8, 1914.

1. **JUSTICES' COURTS: Sufficiency of Statement.** A statement filed in a justice's court, alleging that defendant is indebted to plaintiff for \$125 for medical services rendered by plaintiff to a third person at the special request of defendant, and that the services were reasonably worth \$125, and praying for judgment for that amount and costs, was sufficient, especially after judgment.
2. **PHYSICIANS AND SURGEONS: Services Rendered Third Person: Sufficiency of Evidence.** In an action by a physician for medical services rendered defendant's adult son, evidence held sufficient to sustain a finding that the services were rendered under an express promise by defendant, made before their rendition, that he would pay plaintiff for them; and hence it is held that the case was one for the jury.
3. ———: ———: **Evidence.** In an action by a physician for medical services rendered a third person at the request of defendant, a statement filed with an insurance company by the third person, in which, after setting out that he had sustained the injuries for which plaintiff treated him, he stated that he thought he was entitled to his lost wages and doctor's bills, and that such bills amounted to \$150, was inadmissible against plaintiff, as also was evidence that the third party had been paid by the insurance company for doctor's bills.
4. ———: ———: **Instructions.** In an action by a physician for medical services rendered a third person at the request of defendant and under a promise by him, made before the services were rendered, that he would pay plaintiff therefor, held that an

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instruction given for plaintiff, submitting his theory to the jury, was free from error.

5. **INSTRUCTIONS: Refusal: Covered by Other Instructions.** It is not error to refuse an instruction which submits a theory that is fully covered by other instructions given.
6. ———: ———: **Not Supported by Evidence.** It is not error to refuse an instruction which submits a theory that is not supported by the evidence.

Appeal from St. Louis City Circuit Court.—*Hon.*  
*Charles Claflin Allen*, Judge.

**AFFIRMED.**

*Adolph R. Grund* for appellant.

(1) Plaintiff seeks to recover under his petition for services rendered a third person on an implied contract; plaintiff knew that the services to be rendered were not for the benefit of the defendant, and that defendant was under no legal obligation to pay therefor. Plaintiff cannot predicate a claim against defendant unless defendant expressly promised to pay for them before the services were rendered. *Morrell v. Lawrence*, 203 Mo. 363. If the contract relied on by plaintiff for a recovery be express it must be so pleaded, but if it is implied, the facts out of which it is claimed to arise must be pleaded. *Wetmore v. Grouch*, 150 Mo. 671; *Wells v. Railroad*, 35 Mo. 164; *Rankin v. Beal*, 68 Mo. App. 325. (2) The court erred in refusing to direct verdict for the defendant at close of plaintiff's case. (a) There is no evidence as to any implied contract. (b) Plaintiff did not make a prima facie case against the defendant. *Morrell v. Lawrence*, 203 Mo. 363; *Crowell v. Donoho*, 168 Mo. App. 307. (3) Testimony of J. Langford and the testimony of C. H. Pangey and "Exhibit A" were admissible as part of the *res gestae*, and as an explanatory fact. 1 Elliott on Evidence, sections 154, 155, 541, 548; Gard-

ner v. Crenshaw, 122 Mo. 79; State to use v. Mason, 112 Mo. 380. (5) Plaintiff's petition was predicated upon an implied promise. Plaintiff's instruction No. 1 was predicated on that petition. There was no evidence introduced by either plaintiff or defendant of an implied contract or facts from which a contract could be implied by law and when there is no evidence to support the verdict, the judgment will be reversed. Howard v. Cohow, 33 Mo. 118; Moore v. Hutchinson, 69 Mo. 429; Flanders v. Green, 50 Mo. App. 371.

*Jesse T. Friday* for respondent.

(1) Formal pleadings are not required in justice's court and much latitude is allowed in the statement of a cause of action; it being sufficient, if the statement affords reasonable notice to the adversary of the claim relied on, and operates to bar another suit on the same cause of action. Brewing Company v. Ehlhardt, 139 Mo. App. 129; Guarantee Int. Fix. Co. v. St. Louis American League B. B. Co., 152 Mo. App. 601; Lord & Bushnell Co. v. Texas N. O. R. Co., 155 Mo. App. 175; Mut. Tel. Co. v. Hope, 139 Mo. App. 282; Cardwell v. Connor, 142 Mo. App. 14; Vail v. Rumsey-Sikemeyer Co., 137 Mo. App. 446. Whether plaintiff, in an action in the justice's court, pleaded his cause of action on the *quantum meruit* or an express contract, is immaterial; he may recover though his pleading be one of *quantum meruit* and the evidence shows an express contract. Herrick v. Maness, 142 Mo. App. 399; Walker v. Guthrie, 102 Mo. App. 420; Buschmann v. Bray. 68 Mo. App. 8. (2) The court was correct in refusing to direct a verdict for the defendant at the close of plaintiff's case, as plaintiff alleged and proved a valid cause of action. Cases *supra* cited. (3) Plaintiff's instruction fully and properly covered the case. Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553; Freeman v. Junge

Baking Co., 126 Mo. App. 124: Morrell v. Lawrence, 203 Mo. 363.

REYNOLDS, P. J.—Plaintiff below, respondent here, commenced an action against defendant, now appellant, before a justice of the peace, filing a written statement in which it is set out that defendant is indebted to plaintiff in the sum of \$125 for medical services rendered by plaintiff to one Langford, from June 2, 1910, until on or about September 3, 1910, “at the special instance and request of defendant,” and that the services so rendered by plaintiff were reasonably worth the sum of \$125. Alleging demand and refusal to pay, plaintiff asks judgment for that amount and costs.

We are not advised of the result before the justice, but on appeal to the circuit court and a trial there, plaintiff recovered, from which defendant has duly perfected his appeal.

Nine errors are assigned here.

The first assignment is that the petition does not state facts sufficient to constitute a cause of action against defendant. We do not think that point is well taken. It is argued that the petition or statement does not contain an averment of an express promise to pay but rests on an implied contract, and that neither has been proven. Morrell v. Lawrence, 203 Mo. 363, 101 S. W. 571, is relied on in support of the contention that where there is no implied promise, there must be an express one, made before the services were rendered. The point urged in that case was that the petition and the facts in the case did not make out an implied promise; that such a promise did not arise on the mere fact that the father called a physician to attend his sick son, a man of mature age. But the court held that there was evidence from which a promise to pay could be implied. It is admitted that the statement here sets



out facts on which an implied promise may arise. There is evidence not only tending to sustain this but also evidence tending to show the services were rendered under an express promise by defendant, made before their rendition, that he would pay plaintiff for them. Over and above that, even if this statement, a statement filed before a justice of the peace, is defective, it is not so fatally defective that it will not sustain a judgment, and it is entirely sufficient after judgment.

This practically disposes of the second assignment of error to the action of the court in refusing to direct a verdict for defendant made at the close of plaintiff's case. As before stated, there was ample evidence of the employment of the physician by defendant and of that employment being accompanied by the promise on the part of defendant to pay.

This also disposes of the fifth and eighth assignments of error, which are to the effect that there is no evidence to support the verdict and no evidence to support the allegations of the petition.

The third and fourth assignments of error are to the exclusion of competent, relevant and material evidence, as it is claimed. The evidence offered and excluded and upon which this mainly rests, was a statement filed with an insurance company by Langford, in which, after setting out the facts of the accident as far as he knew them, he stated that he thought he was entitled to his lost wages, and doctor's bills, and that he "makes claim for \$500." To this he added: "My doctor's bills amount to \$150." There was no evidence whatever that this statement was brought to the knowledge of the plaintiff, so that it was inadmissible against him for any purpose whatever. So it may be said of evidence attempted to be introduced to the effect that Langford had in point of fact been paid by the insurance company for his doctor's bills. But there is no pretense that this plaintiff had been paid by any one

for his services rendered in attendance upon Langford.

Error is assigned to the giving of plaintiff's instruction and to the refusal of the court to give two instructions asked by defendant. Consideration of the instruction given at the instance of plaintiff discloses no error in it. It correctly placed the case before the jury. The issue sought to be placed before the jury by the first instruction asked by defendant and refused, was fully and correctly covered by the instruction given at the instance of plaintiff.

Defendant's second refused instruction is to the effect that if the jury found from the evidence that defendant did not agree to pay for more than the first or emergency treatment, then the jury were instructed that they might find in favor of plaintiff for only such an amount as the jury might believe from the evidence would be reasonable for such services. It is sufficient to say of this refused instruction that it is not supported by any substantial testimony in the case. It is in evidence that there was some discussion between defendant and the wife of the injured man, Langford, as to the insurance company being liable for "first aid" services, but there is not a particle of evidence bringing knowledge of this home to plaintiff; to the contrary there is the affirmative evidence of an employment of plaintiff by defendant at the outset and a promise on the part of defendant to pay for the services so rendered. There is no evidence in the case of any qualification of this, of which the plaintiff had any knowledge.

The verdict of the jury was obviously for the right party, is sustained by substantial evidence, and the trial was without prejudicial error committed against the interest of defendant. The judgment of the circuit court is affirmed. *Nortoni and Allen, JJ.*, concur.

**HARRY TROLL**, Public Administrator, in charge of  
Estate of **HECTOR A. PIEDNOIR, JR.**, deceased,  
Respondent, v. **DAUGHERTY & BUSH REAL  
ESTATE COMPANY**, Appellant.

**St. Louis Court of Appeals.** Argued and Submitted November  
4, 1914. Opinion Filed December 8, 1914.

1. **PRINCIPAL AND SURETY: Pledges: Duty of Pledgee: Discharge of Surety.** It is the duty of a person holding collateral security to carefully and faithfully perform all acts necessary to make the collateral available, and if he fail to perform this duty, as a result of which the collateral is lost, a surety for the debt is discharged, to the extent that he is thereby injured.
2. ———: ———: **Discharge of Surety.** Where a surety for a debt consents, either expressly or impliedly, to release a part of the collateral security, he is not discharged by reason of such release being made.
3. **APPELLATE PRACTICE: Conclusiveness of Finding: Equity Suits.** The appellate court is not bound by the finding of the trial court in an equity suit, but may draw its own conclusion from the facts in evidence as presented by the record; but where the evidence is conflicting, and there is substantial evidence to support the finding, the appellate court will defer very greatly thereto.
4. **PLEDGES: Foreclosure: Defenses: Sufficiency of Evidence.** In an action to recover the balance due on promissory notes which were secured by the pledge of collateral, and to foreclose the equity of redemption in such collateral, defended on the theory that plaintiff had released other collateral which also had been pledged, for much less than its value, without defendants' consent, evidence held to justify a finding that defendants gave their consent to the release of the collateral.

Appeal from St. Louis City Circuit Court.—*Hon. J.  
Hugo Grimm*, Judge.

**AFFIRMED.**

*S. T. G. Smith* for appellant.

(1) A person holding commercial paper as collateral security for a debt due him has no right to compro-

mise with the parties who owe the paper held as security for a less sum than the sum due on the paper held as security, and if he does he will be compelled to account to the pledgor for the full value of the security so released. *Wood v. Matthews*, 73 Mo. 477; *National Exchange Bank v. Kilpatric*, 204 Mo. 119; *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Griggs v. Day*, 32 Am. St. 704 (136 N. Y. 152); *Fisher v. George S. Jones Co.*, 108 Ga. 490; *Brown v. First National Bank*, 112 Fed. 901; *Harrell v. Citizens Banking Co.*, 111 Ga. 846. (2) The pledgee of commercial paper as collateral security for the payment of a debt has no authority to sell the commercial paper held by him, either at public or private sale, but is bound to hold and collect the same as it becomes due and apply the net proceeds to the payment of the debt so secured. *Richardson v. Ashby*, 132 Mo. 238.

*J. L. Hornsby* for respondent.

(1) A pledgee may, with the consent of the pledgor, compromise or release the security held by him. (2) The appellate court will give much deference to the findings of the trial court on account of the superior advantages the latter possesses for weighing the evidence and judging of the credibility of witnesses. *Parker v. Roberts*, 116 Mo. 667; *Snell v. Harrison*, 83 Mo. 651; *Loan & Trust Co. v. Browne*, 177 Mo. 412; *Crawford v. Dixon*, 97 Mo. App. 558.

REYNOLDS, P. J.—This is a suit in equity by respondent, as public administrator in charge of the estate of one Hector A. Piednoir, deceased. The petition sets up that Piednoir in his lifetime held notes secured by a deed of trust on various properties, one note being for \$10,000 and fifty notes for \$200 each, aggregating \$10,000, all executed by appellant, all the notes representing but one indebtedness of \$10,000.

During the lifetime of Piednoir the indebtedness had been reduced until, as it is claimed, it amounted to \$1400 with accrued interest, and all the collaterals had been released except a deed of trust on a certain lot on Wyoming street and fifty-seven notes executed by one Lila Drumm, and also a certain leasehold to a building on Chestnut street in the city of St. Louis. Averring that this \$1400 and accrued interest still remains due and unpaid, plaintiff prays judgment for the debt and interest, for reasonable attorney's fee, and that the equity of redemption of defendant in these fifty-seven notes, together with the deed of trust securing the same and covering the lot on Wyoming street, as well as the leasehold on Chestnut street, might be foreclosed and that the collaterals, or so much thereof as may be necessary, be sold to pay off and discharge the debt.

The answer challenges the claim of any remaining indebtedness, averring that one of the pieces of property pledged, consisting of parts of two lots in Temple Place, had been discharged from the lien of the deed of trust without the knowledge and consent of defendant and for the sum of \$2500 (at the trial it appeared that this should have been \$2000), when in point of fact the equity of the defendants in it was worth \$5000, and judgment over is asked by the defendant for this difference.

The trial was before the court, as in equity, and resulted in a finding for plaintiff as prayed by it, save as to attorney's fees, the claim to which was not pressed, and a denial of the relief asked by defendant. From this defendant has appealed.

There are but two points that need be considered in the determination of this case. First, whether the evidence warranted the learned trial court in finding that the Temple Place property had been released with the consent of defendant, and, second, if that consent

had not been given, whether defendant had sustained any loss by the release of that property.

Turning to the evidence in the case, it appears that there had been a practical dissolution of the corporation defendant and a distribution of its assets among the two gentlemen, Messrs. Dougherty and Bush, who appear to have been practically the sole owners of its stock and to have composed the corporation, as well as of another allied one, called the Hampton-Russell Investment Company. It appears that on this dissolution, Mr. Dougherty took over certain of the assets, including the properties which are here in controversy, all under various mortgages, the defendant company holding merely equities in them subject to two or more prior encumbrances. Being indebted to a Mr. Dowling and being pressed by Dowling for a payment of his indebtedness, Dougherty told Dowling that he had not the money to pay him, and telling him that he and Mr. Bush had divided up their interest and that he (Dougherty) had taken over the equities in a lot of property, he would turn that equity over to Dowling. Dowling figured on the value of the property, and finding it all under two or more deeds of trust, and that the only interest of the defendant corporation was in the equities, and figuring up the encumbrances, agreed that if Dougherty would straighten up some of the indebtedness, taxes, etc., he would take it. Dougherty told him he could not do anything of the kind; that he (Dowling) would have to take it just as it was. Dougherty explained to Dowling that the properties were tied up in the blanket deed of trust which was held by Piednoir, and if he took the properties subject to this encumbrance, he (Dowling) would have to work his way out of it the best he could, and if he sold any of the property which Dougherty was transferring to him, he (Dowling) could get a release of the property so sold from the Piednoir

deed of trust; that "by making a right payment to Mr. Piednoir he would release;" that he (Dowling) would have to satisfy Mr. Piednoir before he would give a release to any of the property. Dowling finally agreed to take the properties but objected to taking them in his own name as he did not wish to personally assume the encumbrances. Accordingly the Temple Place with other properties, but not the leasehold nor the Wyoming street lot, were deeded over to his wife by the Hampton-Russell Investment Company, the subsidiary company of the defendant corporation, above referred to, by a deed of warranty, subject, however, to taxes and "all encumbrances of record," title to the equities in the properties being in the Hampton-Russell Investment Company by mesne conveyances from the defendant company.

The indebtedness of defendant to Piednoir originally was \$10,000, evidenced by a \$10,000 note as well as by fifty notes for \$200 each, the latter payable monthly. Mr. Hornsby was the agent and attorney for Piednoir in the collection of this indebtedness during the latter's lifetime and from time to time Dowling paid off several of these collateral notes to Hornsby as such agent, and as he paid off any of the notes he secured releases from Piednoir on various pieces of property that he, more accurately his wife, had thus acquired and which Piednoir held. That is, he and Hornsby or Piednoir agreed upon the price which should be paid for the release of these separate pieces of property. It does not appear that either Dougherty or Bush were consulted or had anything to do with these releases, or the terms upon which they were made. As Dougherty would sell any of these pieces in which he held equities of the Hampton-Russell Investment Company, he would procure a release from Piednoir for that piece, paying him what was agreed upon apparently between Piednoir, or Hornsby, as his representative, and Dowling. It is in evidence that

both Dougherty and Bush knew of Dowling obtaining these releases from time to time and had never made any objection to them; on the contrary, when informed from time to time of what had been done with reference to them, Dougherty and Bush appeared satisfied and told Dowling that he was "doing fine in getting rid of the stuff and reducing the indebtedness." It does not appear from any evidence that Dougherty or Bush suggested that they were to be consulted in the matter of releases, or that they were to have anything to do with that, or that they ever set any amount that was to be paid on any particular piece of property for its release or set any terms which Dowling would be authorized to make with Piednoir or with his representative in obtaining the release of any particular piece; the whole matter of releases was apparently left to Dowling and Piednoir; what Dougherty said when negotiating the matter with Dowling was that he (Dowling) would be able to get along all right with Piednoir and Hornsby as his agent, and that Hornsby would treat Dowling all right in the matter of releases.

Having acquired the equities in these properties, it appears that Dowling negotiated for a trade of this Temple Place property for some other property in the city of St. Louis, and to do so it was necessary to have it released from the Piednoir deed of trust. It appears that both Dougherty and Bush knew of this but neither of them said anything to Hornsby about it or made any suggestion to Dowling. When Dowling was ready to close this trade and had arranged with Mr. Hornsby for the release of the Temple Place property from the lien of this deed of trust, he went to Mr. Dougherty and obtained from him certain of the collateral notes which had been paid and which were covered by this deed of trust, the notes being in the possession of Dougherty, and which it was necessary to present to the recorder of deeds in order to have the release en-



tered of record. He then told Dougherty that he had obtained the release from Hornsby and needed these notes to get the deed of trust released. Dougherty gave him all of the notes which he held except one, which appears to have been lost, and said at the time he gave them to Dowling that he was "glad he got along with it that way." With these notes as well as those which were in possession of Hornsby in hand, Dowling had this Temple Place property released from the deed of trust. Hornsby, as agent for Piednoir, received \$2000 from Dowling and gave a release of the Temple Place property, crediting the \$2000 on the indebtedness, thus cutting the principal down to about \$1400. It appears from the testimony of Hornsby that after he had made the negotiation with Dowling for the release of this property and had received the \$2000 for that release and had turned over the release to Dowling, that Mr. Bush, one of the officers and joint owner with Dougherty in the defendant corporation, came to him and asked him if Dowling was about to procure the release of this property. Hornsby told him that he had already released it to him, but testified that he did not remember telling him the amount for which he had released it. Bush says he did not tell him, nor did he ask him what the amount was; all that Bush said at the time, according to Hornsby, was that Dowling had promised him that he would let him know before he closed the deal about the Temple Place property. He expressed no dissatisfaction with the fact of the release. He complained that the negotiation had been carried on and consummated by Dowling without Dowling first having conferred with him about the matter, as he said Dowling had promised to do. Dowling on his part denied that he had any such arrangement with Bush but said that the whole matter of obtaining releases on such terms as he could secure from Piednoir or his representative had been turned over to him by Dougherty and by Bush when

he took over the equities which were in the name of the defendant corporation in this Temple Place and other property along with the other property.

So much for the matter of consent.

Turning to the question of the value of the equity in the Temple Place lots, we find the testimony was that this value did not exceed \$7000 or \$7500; other testimony was to the effect that it was worth not to exceed \$5000. There were two prior deeds of trust on this Temple Place property, each for \$4800. There were also \$6300 unpaid on the \$10,000 (the Piednoir) indebtedness, and Dowling paid off \$600 on this before he secured the release of the Temple Place property. That is, there were \$7500 due on the whole debt, for which Piednoir held the Temple Place property, the Wyoming street property and the leasehold, as well as fifty-seven of the notes and perhaps other pieces of property. When the \$2000 were paid for the release of the Temple Place property, Piednoir still had the Wyoming street property, the leasehold and the collateral notes. The highest value put upon the Temple Place property was \$7750. Dowling had tried in vain to sell them for \$7000 each. So the evidence places the equity as worth from \$3250 to \$2500.

There can be no question of the principles which must govern cases of this kind. On the kindred question of the discharge of a surety by the acts of the creditor, it is said by an accepted authority (1 Brandt on Suretyship & Guaranty (3 Ed.), sec. 480), that "if the creditor has a surety for the debt, and also has a lien on property of the principal for the security of the same debt, and he relinquishes such lien, or by his act such lien is rendered unavailable for the payment of the debt, the surety is, to the extent of the value of the lien thus lost, discharged from liability. . . . Upon obtaining such a lien the creditor becomes a trustee for all parties concerned, and is bound to apply the property to the purposes of the trust. . . . The surety

is entitled, upon paying the debt, to subrogation to all the securities which the creditor may have at any time acquired for the payment thereof, and it results as a corollary from this proposition, that if this right is rendered unavailing by the act of the creditor, the surety is discharged to the extent that he is injured."

It is further said by this author that the mere silence of the surety when he knows that the creditor is about to release securities, will not prevent his discharge, "as in such case he is not called upon to speak. But where such release is made at the instance and request of the surety, he is not thereby discharged." One of the authorities cited for this, *Polak v. Everett*, Law Rep. 1 Q. B. Div. 669, states the rule somewhat differently, following what was held in *Freeman v. Cooke*, 2 Ex. 654, where it was said "that if a man stands by and allows another to act without objecting, when, from the usage of trade or otherwise, there is a duty to speak, his silence would preclude him as much as if he proposed the act himself."

In *Pence v. Gale*, 20 Minn. 257, it is held that where the owner of a promissory note who holds collateral security for it, gives a release at the surety's instance and with his consent the surety is not discharged. So, too, in *Brown v. Abbott*, 110 Ill. 162, where it is held that when a party consents to the doing of the act which would not have been done but for his assent thereto, the person so assenting will not be permitted to make the doing of it a matter of personal advantage to himself.

The settled law of our State, in line with that recognized all over the country by all respectable authorities, is, that it is the duty of the party holding a collateral as security to carefully and faithfully perform all acts necessary to make the collateral available and that this is a duty owing to the surety and failing in it by which the collateral is lost, the surety will be discharged to the extent he is thereby injured. [Na-

tional Exchange Bank v. Kilpatric, 204 Mo. 119, 102 S. W. 499.] The rule running through all the authorities being, that if the surety consents to the release of part of the property, he will not be discharged by the release of that part of it, the question here is, whether this defendant, or its representative did consent to the release of this Temple Place property. It is not necessary that the consent should be in express terms; it may be implied here as in all other cases as well by acts and course of conduct as by express words.

Applying these principles to this case, we cannot but conclude with the learned trial judge that in turning over the equities of the defendant to Dowling, and that is all that defendant had in these various pieces of property, and referring him to Piednoir or to his agent as the parties who would do the right thing by him with respect to releases, as well as by the other acts in evidence to which we referred, Dougherty and defendant, through him, left the terms of the release so entirely a matter to be settled between Dowling and Piednoir and his agent and had in so many prior instances connected with releases of the property conveyed to Dowling, ratified or acknowledged this as the proper manner of transacting the business, that it cannot now be claimed that the defendant is entitled to be discharged from any part of this liability by reason of the release of the Temple Place property from under the deed of trust. Considering the course of conduct of the parties in this matter, it would be inequitable and unfair to now hold that the release of this Temple Place property was without authority and unauthorized. That is undoubtedly the view taken by the learned trial court of this matter.

It is hardly necessary to remark that in suits of this kind, that is, in equity, heard before the court as chancellor, the appellate court is not bound by the finding of the chancellor on the facts but may draw its own conclusion from the facts in evidence as presented by

the record. When, however, the evidence is conflicting, and there is substantial evidence to support the finding, appellate courts yield very greatly to the conclusion on that reached by the chancellor. [New England Loan & Trust Co. v. Browne, 177 Mo. 412, l. c. 423 et seq., 76 S. W. 954.] It must be said that an examination of the evidence in this case does not present an unchallenged state of facts, one way or the other, either on the question of consent or of value; in short, it is conflicting. As in all cases, the weight to be given it depends very largely upon the appearance and manner of the witnesses who gave it. That was a matter peculiarly under the observation of the chancellor, who saw and heard the witnesses. We do not think, on a careful consideration of the evidence and applying to it the principles of law to which we have referred, that we would be justified in setting aside the action of the trial court. As this disposes of the case, it is unnecessary to pass upon the question of the value of the equity in the Temple Place property, further than to say that there is substantial evidence to show that defendant sustained no loss by its release for \$2000. That being so, even if the release of that piece of property was not authorized, defendant, not being damaged, is not in a position to complain. [Jones on Collateral Securities (3 Ed.), sec. 515a; National Exchange Bank v. Kilpatrick, supra.]

The judgment of the circuit court is affirmed. *Nor-toni* and *Allen, JJ.*, concur.

**HOLLRAH-DIECKMANN REFRIGERATOR &  
FIXTURE COMPANY, Respondent, v. ST.  
LOUIS HOUSE & WINDOW CLEANING  
COMPANY, Appellant.**

St. Louis Court of Appeals. Submitted on Briefs November 4,  
1914. Opinion Filed December 8, 1914.

1. **STATUTE OF FRAUDS: Sale of Goods: Acceptance and Delivery: Sufficiency of Evidence.** Plaintiff made up the material for office fixtures for defendant, in accordance with a parol contract. Defendant inspected the material so prepared at plaintiff's factory, stating that it was satisfactory, and asking when it would be installed. Subsequently, the material was taken to defendant's place of business and part of it was installed, but, before the work was finished, defendant objected to certain things, and refused to allow plaintiff to go on. In an action for the value of such material, *held* that, although the value of such material was in excess of \$30, nevertheless the case was not within the Statute of Frauds (Sec. 2784, R. S. 1909), since the evidence was sufficient to show an acceptance of all of the material by defendant and a delivery of at least part of it.
2. **APPELLATE PRACTICE: Conclusiveness of Findings.** A finding of fact by the trial court, in an action at law tried to the court, is conclusive on the appellate court, if supported by substantial testimony.
3. **STATUTE OF FRAUDS: Sale of Goods: Acceptance and Delivery.** In a sale of goods of the value of \$30 or upwards, an acceptance of all, and delivery of only a part, of the goods satisfies the Statute of Frauds (Sec. 2784, R. S. 1909).
4. ———: ———: ———. In a sale of goods of the value of \$30 or upwards, acceptance and delivery need not, in order to satisfy the Statute of Frauds (Sec. 2784, R. S. 1909), be contemporaneous, and acceptance may precede delivery, although, to take the case out of the statute, delivery must be made in accordance with the contract.

Appeal from St. Louis City Circuit Court.—*Hon.*  
*Daniel D. Fisher*, Judge.

**AFFIRMED.**

*George B. Webster* for appellant.

(1) This action is one in the nature of assumpsit for the sale of goods, wares and merchandise of the price of more than thirty dollars, and so within the Statute of Frauds. *Schmidt v. Rozier*, 121 Mo. App. 306; *Tower Grove P. M. Co. v. McCormack*, 127 Mo. App. 349; *Pratt v. Miller*, 109 Mo. 78; *Shelton v. Thompson*, 96 Mo. App. 327; *Burrell v. Highleyman*, 33 Mo. App. 183. (2) There being no writing and no payment on account of the purchase price, it was error to refuse an instruction directing a verdict for the defendant, as the evidence was insufficient to establish delivery and acceptance. *Sotham v. Weber*, 116 Mo. App. 104; *Hinchman v. Lincoln*, 124 U. S. 49; *Eichberg Co. v. Benedict P. Co.*, 119 Mo. App. 262; *Shelton v. Thompson*, 96 Mo. App. 327; *Harvey v. Butchers Ass'n.*, 39 Mo. 212; *Browne*, Statute of Frauds, sec. 317-a. (3) Both delivery and acceptance must occur to avoid the statute. Mere delivery is not sufficient; both parties must act, the seller by surrendering dominion and control, and the buyer by doing something manifesting an intention to accept the goods as satisfying the contract. *Young v. Ingalsbe*, 208 N. Y. 503; affirming 135 N. Y. S. 939; *Berkman v. Brower*, 135 N. Y. S. 582; *Gold v. Gross*, 146 N. Y. S. 164; *Shindler v. Houston*, 1 N. Y. 262; *Eichberg Co. v. Benedict P. Co.*, 119 Mo. App. 262; *Wainscott v. Kellogg*, 84 Mo. App. 621; *Hinchman v. Lincoln*, 124 U. S. 49; 20 Cyc. 247-249; 1 *Mechem*, Sales, sec. 383.

*Rassieur, Kammerer & Rassieur* for respondent.

(1) The case having been tried by the trial court without a jury, and no declarations of law or findings of fact having been asked or given, the judgment will not be disturbed on appeal, if there is any evidence tending to support the judgment, upon any theory pre-

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Fixture Co. v. Cleaning Co.

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sented. *Lime & Cement Co. v. Clore*, 170 Mo. App. 675, 680. *Oellien v. Duncan*, 148 Mo. App. 600; *Huke Co. v. Transfer Co.*, 146 Mo. App. 355. And in such case the judgment will not be reversed if it may be sustained on any view of the evidence, and this includes all reasonable inferences in favor of the respondent's case. *Brix v. American Fidelity Co.*, 171 Mo. App. 518; *Hanenkratt v. Brougham*, 164 Mo. App. 108; *Pierce Loan Co. v. Killian*, 153 Mo. App. 106. Whether the goods sued for, or any part of them, were accepted and received by the defendant, was a question of fact to be determined by the trial court sitting as a jury. *Swafford v. Spratt*, 93 Mo. App. 631; *Garfield v. Paris*, 96 U. S. 557. 1 *Mechem on Sales*, sec. 373. (2) The acceptance and delivery required by the Statute of Frauds need not be contemporaneous, and the acceptance may precede the delivery. 1 *Mechem on Sales*, sec. 362; *Cross v. O'Donnell*, 44 N. Y. 661; *Garfield v. Paris*, 96 U. S. 557. (3) The examination of the goods by defendant's president and his expression of approval and satisfaction, together with his order to deliver them to defendant's store, was sufficient evidence of an acceptance under the statute. *Victor v. Stroock*, 5 N. Y. Supp. 659; *Cross v. O'Donnell*, 44 N. Y. 661. (4) An acceptance and receipt of a part of the goods sold is sufficient to take the case out of the statute. Sec. 2784, R. S. Mo. 1909; *Rickey v. Tenbroeck*, 63 Mo. 563; *Earl Fruit Co. v. McKinney*, 65 Mo. App. 220; *Lyle v. Shinnebarger*, 17 Mo. App. 66; *Sprague v. Blake*, 20 Wend. 63; *Farmer v. Gray*, 16 Neb. 401.

**REYNOLDS, P. J.**—This action, instituted before a justice of the peace on an account for office railing, glass partitions and doors, the amount being \$333, resulted in a verdict for plaintiff, from which defendant appealed to the circuit court, where on a trial before



the court, a jury having been waived, judgment went for plaintiff for the amount claimed.

It was insisted at the trial in the circuit court that there was no evidence of delivery or acceptance of the goods, and as the sum claimed exceeded \$30, and no memorandum in writing had been executed between the parties, that the transaction fell within the provisions of our Statute of Frauds. When this objection was made at the trial, counsel for plaintiff, admitting that the contract was not in writing, stated that if they did not show a compliance with the statute, proving an acceptance and delivery of part of the goods sold, plaintiff could not recover. Thereupon plaintiff introduced its testimony and at the close of it defendant asked the court to declare that under the law and the evidence in the case plaintiff was not entitled to recover. The court refused this, whereupon defendant introduced its evidence, and plaintiff introducing evidence in rebuttal, defendant again renewed its request for a declaration to the effect that plaintiff could not recover. This the court refused and rendered judgment in favor of plaintiff and against defendant and its surety on the appeal bond for the amount claimed and interest. Filing a motion for new trial and excepting to the action of the court in overruling it, defendant has duly perfected its appeal to this court.

Here it is insisted that the action is one in the nature of assumpsit for the sale of goods, wares and merchandise at a price of more than \$30, the transaction thus being within the Statute of Frauds; that as there was no written contract and no payment on account of the purchase price, the declaration of law asked by the defendant should have been given, as the evidence was insufficient to establish delivery and acceptance, both of which must occur to avoid the statute.

Counsel very strenuously argues that there is a failure of evidence of acceptance and delivery. Reading the testimony in the case, we are compelled to say that we cannot agree with counsel. There is evidence tending to prove that defendant, desiring to have certain office fixtures, partitions and the like, installed in its place of business, invited a proposal for the work from plaintiff, which proposal plaintiff made in writing, proposing to do the work required for \$436. This proposal was signed by a representative of plaintiff and presented in duplicate to the president of defendant. The parties went over it, made some changes in it and plaintiff left the proposal which it had signed in duplicate, with the president of the defendant company, who retained them but never signed them in behalf of defendant. It also appears that detail plans and specifications of the proposed work were drawn up which were settled upon by both parties. Thereupon plaintiff made up the material and the president of defendant going to plaintiff's factory where the material was, it then being all completed and ready to be installed except that the paint was not dry, and all made in accordance with the plans and specifications, as a witness for plaintiff testified, defendant's president looked it over very carefully. "The entire job was complete," said a witness, when the president of defendant walked into the finishing room in which the material was standing. It was shown to him and he looked at it and said it was satisfactory. "He sized it up very closely and looked at it, and asked me how soon I was going to install it for him," said a witness, and "I told him I would install it the next Tuesday, which I did. . . . As he was leaving the office door, I was standing there and asked him—I says to him, 'How do you like the job,' and he said, 'It surely looks pretty.' " The material was afterwards taken to the place of business of defendant and part of it installed. Plain-

tiff was proceeding to install all of it, when defendant's president made objection to various parts of it which he wanted changed, as for instance locks, and the manner in which the door was to be hung. It seems that plaintiff agreed to change the character of the locks but the workman in charge of the job refused to make an alteration in the place and manner in which the door in the partition was located, he saying that this was in accordance with the plans and specifications by which he was working. An officer of plaintiff afterwards arrived at defendant's place and he also refused to make the change, claiming that the material was according to plans and specifications and that the change would involve an entire change in the work, and insisting that it was according to plans and specifications, refused to make this alteration. Whereupon the president of defendant declined to proceed any further with the matter, declined to allow plaintiff to go on with the installation of the partition and railing, or to allow it to complete the job. Whereupon, leaving the material so far as delivered on the premises of defendant, plaintiff was forced to discontinue further work. The account is for the value of the partition and railing, there being evidence that they were of the value charged for in the account.

The defense, apart from the Statute of Frauds, was that the articles were not as contracted for; that there had been no acceptance of them, and no delivery. As before remarked, the case was before the court without a jury and beyond the instructions asking for a verdict for defendant, no instructions or declarations of law were asked or given.

The question as to whether the articles sued for or any part thereof were accepted and received by defendant, both of which must appear, was a question of fact, to be determined by the trial court, and its conclusion is binding upon us, if supported by substantial evidence. There was substantial evidence to show an

acceptance of all of the material and delivery of at least part of it. When that happens, the requirements of the statute (section 2784, Revised Statutes 1909) are met. [Rickey et al. v. Tenbroeck et al., 63 Mo: 563, l. c. 569; Earl Fruit Co. v. McKinney, 65 Mo. App. 220.]

Acceptance and delivery need not be contemporaneous; acceptance may precede delivery. A delivery, to take the case out of the statute, must be made in pursuance of the contract, and the question whether it was so made or not is for the jury or the court sitting as a trier of fact. "Due acceptance and receipt of a substantial part of the goods will be as operative as an acceptance and receipt of the whole; and the acceptance may either precede the reception of the articles or may accompany their reception." [Garfield v. Paris, 96 U. S. 557, l. c. 566.]

In Cross v. O'Donnell, 44 N. Y. 661, it is said (l. c. 664): "There is nothing in the statute which requires that the accepting and receiving should be at the same time. Either may precede the other; and, after both have concurred, the statute has been complied with and the contract becomes operative and valid."

This case presents a state of facts very similar to those in Victor v. Strook, 5 N. Y. Supp. 659, in which it was held that the facts in evidence were sufficient to take the case out of the operation of the statute.

Our conclusion is that there was no error in the action of the circuit court, and its judgment in favor of plaintiff is affirmed. *Nortoni and Allen, JJ.*, concur.

STATE ex rel, HENRY AHRENS, SR., Relator, v.  
LEO S. RASSIEUR, Judge, Respondent.

St. Louis Court of Appeals. Argued and Submitted November 17, 1914. Opinion Filed December 8, 1914.

1. **HABEAS CORPUS: Custody of Child: Retention of Jurisdiction After Final Judgment.** In a *habeas corpus* proceeding by the father of a child against its grandparents, for the custody of the child, the court had no power to incorporate in the judgment remanding the child a provision that the court retained jurisdiction of the cause for the purpose of making such other orders from time to time, with reference to the custody of the child, as its best interest might require, since the court exhausted its jurisdiction when it ordered the child remanded; Sec. 2510, R. S. 1909, not being applicable, for the reason that it relates only to *habeas corpus* proceedings between husband and wife.
2. ———: ———: ———: **Issues.** In a *habeas corpus* proceeding by the father of a child against its grandparents, for the custody of the child, the petition prayed that the writ be issued to bring the child before the court that she may be released from the restraint and keeping of respondents, and that the care, custody and control of the child be awarded to petitioner. The return of respondents asked that they be discharged from the writ and that the child be restored to their custody and control. *Held*, that a provision in the judgment remanding the child to the custody of respondents, that the court retained jurisdiction of the cause for the purpose of making such other orders, from time to time, with reference to the custody of the child, as its best interest might require, was not within the issues and was *coram non judice*.
3. ———: **Nature of Action.** *Habeas corpus* is an action at law.
4. ———: **Appellate Practice: Appealable Orders.** A judgment in a *habeas corpus* proceeding, either discharging or remanding the petitioner, is not appealable.
5. **PROHIBITION: Habeas Corpus: Orders Subsequent to Final Judgment: Jurisdiction.** Prohibition lies to restrain the circuit court from making orders with respect to the custody of a child, in a *habeas corpus* proceeding, where a final judgment has previously been entered in the proceeding.

## Prohibition. Original Proceeding.

WRIT MADE ABSOLUTE.

*Albert C. Davis* for relator.*Marion C. Early* for respondent.

REYNOLDS, P. J.—At the April term, 1911, of the circuit court of the city of St. Louis, one Lee H. Mallalieu filed a petition for a writ of *habeas corpus* for the possession of his daughter Jessalee, then about two years old and in the custody of Henry Ahrens, Sr., her grandfather, and Alvina Ahrens, her grandmother, her mother being dead. The prayer or demand for relief in the petition is:

“Wherefore, your petitioner prays that a writ of *habeas corpus* may be issued to bring the said Jessalee Mallalieu before the court that she may be released from the restraint and keeping of the said Henry Ahrens, Sr., and Alvina Ahrens, his wife, and that the care, custody and control of said child be awarded to your petitioner.”

The return of Ahrens and his wife to the writ concludes thus:

“Respondents having fully made return ask to be discharged of the writ aforesaid and that the said Jessalee Mallalieu be restored to their care, custody and control as heretofore.”

The cause was duly assigned to division number 9 of the circuit court, then presided over by the Honorable Leo S. Rassieur, respondent here. At the hearing of the case on this petition and return it appeared that the child had been committed to the custody of the grandparents at the request of their daughter, then about to die, and with the assent of the father, the petitioner for the writ. At the conclusion of the hearing and on the last day of the April, 1911, term of the

circuit court, the court denied the prayer of the petitioner, holding that the best interests of the child would be conserved by leaving her in the custody of her grandparents. It, however, granted to the petitioner, Mallalieu, the right to visit and have the custody of the child at certain stated intervals. The court further embodied as part of its judgment this: "And the court doth retain jurisdiction of this cause, for the purpose of making such other and further orders, from time to time, with reference to the custody of the child aforesaid, as in the judgment of the court, the best interest and welfare of the said child may require."

Nothing further transpired in the cause until June 27, 1914, when at the June term of the circuit court, apparently on the *ex parte* application of Mallalieu, the petitioner in the original cause, and without any notice to the respondents in that cause, the judge then presiding in division number 9 of the court entered an order transferring the cause to division number 4 of the court, that being the division to which the Honorable Leo S. Rassieur had in the meantime been assigned and over which he was then presiding. Thereafter and in this division number 4, a motion was filed by Mallalieu, entitled in the original case, praying the court to make an order altering and amending the decree theretofore made by the court in division number 9, on June 3, 1911, as above stated, as to the custody of the child, and to give Mallalieu exclusive custody of his daughter, free from any interference or control of the grandparents. The Honorable Circuit Judge, then presiding in division number 4, passed this motion until July 14, 1914, announcing his determination then to hear and determine the motion upon the merits.

It was to prohibit that judge from entertaining jurisdiction of the cause that the present action was brought, a petition being filed in our court in vacation, upon which an alternative writ was issued prohibiting

the Honorable Circuit Judge from further proceeding, or to show cause to the contrary. To this alternative writ the Honorable Circuit Judge made a return setting up what had been done in the matter and justifying his right to proceed in it under that part of the original order in the case by which it is claimed jurisdiction over the cause had been retained. On the coming in of this return the relator here prayed that the alternative writ be made permanent.

There is no dispute as to the facts, a question purely of law being presented and argued. That question turns on the validity of that part of the order entered in the *habeas corpus* proceeding which we have quoted above.

The relator here contends that this part of the order was without authority and beyond the jurisdiction of the court; that in the *habeas corpus* proceeding which was before the court, its attempt to retain jurisdiction for the purpose of making further orders in it was *coram non judice*; that the proceeding under the petition for *habeas corpus* having passed into judgment, the cause was at an end. The contention of the respondent as to the right to retain jurisdiction over the proceeding seems to rest chiefly upon section 2510, Revised Statutes 1909. That section provides:

“In all cases where it shall appear from the evidence in any proceedings in *habeas corpus*, instituted between husband and wife for the custody of their children under the age of fourteen years, that by reason of insanity, drunkenness, cruelty, or other cause, the party against whom the complaint is brought is unfit to have the care and government of the child or children in controversy, it shall be lawful for the court hearing said cause to award the custody of the same to the complainant or other guardian, as shall be deemed best in the premises, and to make such other orders touching the custody and control of such child or children as the court may deem proper; and the order



or decree of court touching said custody shall be valid and remain in force during any period within the minority of said child or children, which shall be fixed by said court; and any person at any time violating said order or decree may be dealt with summarily for contempt."

This section appears in article 6, chapter 22, Revised Statutes 1909, the article being our statutory provision for proceedings under the writ of *habeas corpus*. It first appeared in our law in 1873, the title of the act being, "An Act to Provide for the Custody of Minor Children in Proceedings in *Habeas Corpus* Between Husband and Wife." [Acts 1873, p. 53.] It is obvious that this section has no application here. This is not a proceeding in *habeas corpus* "between husband and wife." It is said in argument that in drafting this section the General Assembly had in mind the welfare of the child and that although the precise words refer only to the husband and wife, it would seem a harsh construction to say that the lawmakers did not intend the statute to extend to those who stand in the position of parents, whether husband and wife or not. It is further said that the order was made in conformity with early practice in the circuit court of the city of St. Louis.

We cannot assume that the General Assembly, the lawmaking power, in so specifically confining this exception to cases arising between husband and wife, expressing that idea both in the entitling clause and in the body of the act, intended to extend it to any other cases. There is no room here for judicial construction which would have the effect of extending it. To indulge in such construction would not be a judicial act but legislative and beyond the power of the court. Nor can long usage, if that is a fact, and of this we have no information beyond the claim of counsel, make the law otherwise than as enacted. From this it necessarily follows that in attempting to preserve juris-

diction over the subject-matter, that is the custody of this child in the *habeas corpus* proceeding between the father and the grandparents, the action of the court finds no support in section 2510.

Over and above this, the clause in the order assuming to retain jurisdiction over the cause is not within the scope of the issues in this *habeas corpus* proceeding. We have set out the prayer of the petition and the conclusion of the return. These make the issue. This is an action at law. When the court had determined the issue involved, that is, to whom the custody of the child should then be committed, that was the end of that case. Unless acting under section 5316, Revised Statutes 1909, in correcting errors as to the time or place of imprisonment, or under section 2510, where the action is between husband and wife, or under other sections specially providing for the writ, the only order or judgment within the power of the court in proceedings in *habeas corpus*, such as here before us, is one either discharging the person found to be illegally and unlawfully held and restrained, or to remand him, that is, refuse a discharge. Any order outside of that is *coram non judice* and void. That is the rule applied by our Supreme Court even in a suit in equity. [See *State ex rel. McMannus v. McMuench*, 217 Mo. 124, 117 S. W. 25.] The original order made by the court awarding the custody of this infant, a child then under fourteen years of age, in fact at that time about two years of age, was a judgment which finally determined the question of custody on the facts and issues then before the court.

No appeal lies from the decision in *habeas corpus* discharging or remanding the petitioner. Herein lies the reason why the decision must be confined to those matters alone. If the judgment in a proceeding such as here involved, attempts to go outside of this, and embraces matters outside of the issue, matters which may be the subject of appeal, it is outside of any

issue which can lawfully be presented in a proceeding by *habeas corpus* as here presented. So said our Supreme Court in *Ferguson v. Ferguson*, 36 Mo. 197, citing *Howe v. The State*, 9 Mo. 682, in support of the proposition that there is no appeal from a decision in *habeas corpus*. [See also *Weir v. Marley*, 99 Mo. 484, 12 S. W. 798.]

Judge HOLMES has said in the *Ferguson* case, *supra*, l. c. 201: "In this respect, the decision is not of the nature of a final judgment. It concerns only the present actual condition of things, and the order of the court is at once executed and accomplished beyond recall; and in reference to any new state of facts existing afterwards, the parties have the same remedies as before, whether by writ of *habeas corpus*, or other proceeding, in any court of competent jurisdiction, and the courts are always open to them."

The *Ferguson* case was decided in 1865 and before the enactment of the law of 1873 (section 2510, Revised Statutes 1909). If that section had then been in force, it might have been held to apply on the facts in that case, an action between husband and wife. When the action is not between husband and wife, the law as to *habeas corpus* is now as it then was. *Ferguson v. Ferguson* has always been recognized as authority on the subject of the jurisdiction of the courts in *habeas corpus*, as see *Weir v. Marley*, *supra*. It is referred to as authority in *State ex rel. Barker v. Wurdeman*, 254 Mo. 561, l. c. 569, 163 S. W. 849.

Whether the provision in the original order allowing the father to have the custody of the child at certain times, was within the power of the court in that proceeding, it not being a proceeding under the divorce law or one between husband and wife, is not here raised and not considered. We express no opinion whatever upon that phase of this decree in the *habeas corpus* proceeding.

Nor is it important to here pass upon the question of the regularity of the proceeding by which, on an *ex parte* application, the cause purported to be transferred from one division of the circuit court of the city of St. Louis to another. That element disappears from the case and is not important, when we determine, as we here do, that the court, in either division, in attempting to open up the cause, was without jurisdiction and beyond its authority.

For that reason and on that ground, the alternative writ heretofore entered in this cause is made permanent, and the Honorable Judge of the circuit court of the city of St. Louis, respondent here, prohibited from exercising further jurisdiction in the matter of Jessalee Mallalieu wherein Lee H. Mallalieu was petitioner and Henry Ahrens, Sr., and Alvina Ahrens, his wife, were respondents; no costs herein to be taxed against the respondent judge. *Nortoni and Allen, JJ.* concur.

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THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Appellant, v. ARTHUR P. CARSON, Respondent.

Springfield Court of Appeals, December 12, 1914.

1. **REAL ESTATE SALES: Vendor and Purchaser: Fraud: Rescission: Statement of Facts.** Facts stated in an action to recover certain land in which a counterclaim to set aside a contract of sale because of fraud and to recover payments made thereon.
2. **FRAUD: Statements Made Carelessly Without Regard to Truth or Falsity: Actionable.** A statement made carelessly, without regard to its truth or falsity, which proves to be untrue, is fraud and an action for fraud and deceit can be maintained by one who is thereby damaged.
3. **FALSE AND FRAUDULENT REPRESENTATIONS: Sale of Land: Rescission.** Certain false representations made by vendor

of agricultural land which induced the purchase thereof, examined and considered sufficient to entitle the purchaser to rescind.

4. **PRINCIPAL AND AGENT: False Representations of Agent: When Principal Liable: Sale of Land.** When the owner of land pays a broker or agent a commission to sell same and in effecting the sale, the agent makes representations which are false concerning the land and one is induced thereby to purchase, such owner, though not aware of the fraud, upon accepting the benefits of the transaction must also assume the burdens thereof and the fraud of the agent is chargeable to the owner, provided the representations complained of are such as would naturally fall within the apparent scope of the agent's employment.
5. **TORTS: Result of Negligence: Result of Fraud: No Distinction.** There is no reasonable distinction between a tort brought on through fraud and one brought on through negligence.
6. **FRAUD: Sale of Land: Principal and Agent: Misrepresentations: Statement.** Evidence reviewed and fraud of agent in sale of land *held* binding on principal.
7. **VENDOR AND PURCHASER: Ejectment: Set-off and Counterclaim.** Where it is sought to eject a defendant who went into possession under the title of plaintiff and who for some reason should be ejected, the defendant may, if he have an equitable counterclaim against the plaintiff, interpose and try it in the ejectment suit. On the other hand, where defendant went into possession through a stranger to the plaintiff, he must recover the value of the improvements made, which in equity he should have, by an independent action.
8. **VENDOR AND PURCHASER: Sale of Land: Action to Recover Possession: Set-off and Counterclaim.** Where a vendor of land seeks to recover same, the purchaser may set up, under Sec. 1807, R. S. 1909, as an equitable counterclaim, a right to rescind for fraud and to recover payments made.
9. **VENDOR AND PURCHASER: Sale of Land: Fraud: Rescission: Delay: Laches.** Purchaser of certain lands delayed a year and four months to rescind the contract because of fraud. Vendor's position was not changed by the delay. Conditions and circumstances considered and the delay *held* not sufficient to bar the right to rescind.

Appeal from Stoddard County Circuit Court.—*Hon. W. S. C. Walker*, Judge.

**AFFIRMED.**

*Wammack & Welborn* and *Chas. Liles* for appellant.

(1) The respondent visited and inspected the land, and there is no testimony that he was in any way hindered from making as extensive an investigation of it as he desired. Under the circumstances he cannot allege that he was defrauded. *Morse v. Rathburn*, 49 Mo. 91; *Judd v. Walker*, 215 Mo. 337; *McFarland v. Carver*, 34 Mo. 195; *Dunn v. White*, 63 Mo. 181; *Wade v. Ringo*, 122 Mo. 322; *Bradford et al. v. Wright*, 145 Mo. App. 623; *Holland v. Anderson*, 38 Mo. 55; *Ordway v. Ins. Co.*, 35 Mo. App. 434; *Slaughters, Adm. v. Gerson*, 13 Wallace, 379. (2) Mere expressions of opinion or trade talk do not constitute fraud. Nor do mere loose talk and brag about the value of property. *Franklin v. Holle*, 7 Mo. App. 245; *Anderson v. McPike*, 86 Mo. 300; *Chase v. Rusk*, 90 Mo. App. 29. (3) One who claims the right to rescind a contract on the grounds of fraud, must act promptly. *Lewis v. Brookdale Land Co.*, 124 Mo. 672; *Harms v. Wolff*, 114 Mo. App. 395; *Lierheimer v. Life Ins. Co.*, 122 Mo. App. 381. (4) A broker who takes an option to purchase real estate at a stated price, is not the agent of the owner for making the sale. *Benedict v. Pell*, 70 N. Y. App. Div. 74, N. Y. Suppl. 1085; *Dilworth v. Bostwick*, 1 Sweeny, 581; *Southack v. Land*, 23 Misc. 515, 52 N. Y. Suppl. 687.

*Fort & Green* and *Mozley & Woody* for respondent.

(1) Where, in a negotiation between two parties, one of them induces the other to contract on the faith of the representations made to him, any one of which has been untrue, the whole contract is in this court considered as having been obtained fraudulently. *Burnham v. Ellmore*, 66 Mo. App. 621; *Hardwood v.*

Dent, 121 Mo. App. 108. (2) Nor is respondent barred from recovery because he visited the land, at appellant's request, before he bought it. Kendrick v. Ryus, 225 Mo. 166. (3) There is a distinction between actions at law for damages based upon fraud, and suits in equity for rescission of the contract based upon fraud. In a suit for rescission it is not necessary to show that defendant was guilty of willful and intentional fraud. All that is necessary is to show that defendant made representations which were in fact false, and that plaintiff relied upon them and believed them to be true and suffered damages in consequence thereof. Peters v. Lohman, 171 Mo. App. 482-3; Lynch v. Company, 135 Mo. App. 672. (4) Respondent promptly rescinded the contract when he discovered the fraud of appellant which led him into it. Taylor v. Short, 107 Mo. 393; Paquin v. Miller, 163 Mo. 102.

FARRINGTON, J.—The plaintiff is a foreign corporation authorized to do business in Missouri. The defendant for the past three years has resided in Stoddard county in this State. In December, 1910, the plaintiff owned several thousand acres of land in Stoddard county and surrounding counties in southeast Missouri. On December 31, 1910, the defendant paid to one W. Ross McKnight one hundred dollars as a part payment for eighty acres of land in Stoddard county which was then owned by the plaintiff, and took a receipt so stating, which receipt also contained a memorandum of purchase. The total price to be paid was thirty-seven dollars and fifty cents per acre. The vendor, the plaintiff, according to the memorandum, agreed to clear twenty acres of the tract at seven dollars and fifty cents per acre, this amount to be added to the purchase price. The first payment was to be one-tenth of the entire purchase price and was to be paid on or before January 10, 1911, and the remainder of the purchase price was to be paid in eight equal annual

instalments, evidenced by notes payable on the first day of each January beginning January 1, 1913, drawing interest at the rate of five per cent per annum, to be secured by a deed of trust. The memorandum further evidenced that during the year 1911 a slough on the land would be drained. On January 2, 1911, the plaintiff by its proper officers executed a warranty deed to the defendant for the land. This deed was delivered to defendant by W. Ross McKnight who received the first payment in cash and the notes for the balance together with a deed of trust in which William Collins (the general agent for plaintiff in Missouri concerning lands) was trustee. The notes were made payable to the order of the plaintiff, and they were accepted and held by plaintiff until default in their payment, when foreclosure proceedings occurred whereby plaintiff became the purchaser of the land at the price of two thousand dollars. Plaintiff then brought this suit to eject defendant from the land and for damages alleged to have been occasioned by defendant unlawfully withholding possession.

Defendant's answer admitted plaintiff's right to possession but denied that plaintiff was entitled to any damages, and set up a ground for affirmative relief, asking that the unpaid notes and the deed of trust be canceled, and further, that he be given damages sustained by him on account of certain fraudulent representations made to him by W. Ross McKnight through whom he was induced to purchase the land from plaintiff.

The court gave plaintiff judgment for possession, and on defendant's behalf ordered a cancelation of the unpaid notes and deed of trust and gave him judgment for \$586.10 which represented the amount defendant had paid on the purchase price together with the taxes he had paid and interest on such amount.



A brief statement of the facts will suffice to dispose of the case. The evidence showed without controversy that on January 2, 1911, the plaintiff owned the land in question and made a warranty deed therefor to the defendant and received from him the notes and deed of trust. These instruments were delivered by the parties through W. Ross McKnight, a resident of St. Louis. Plaintiff owned this tract together with thousands of acres that it was selling on the market. W. Ross McKnight and one Weeks undertook to carry through a colonization scheme by which they would sell forty to eight-acre tracts and locate the buyers around a central model or demonstration farm to be in charge of an expert. To do this required that they get a body of land comprising from a thousand to fifteen hundred acres and then to find purchasers for the tracts. To accomplish the scheme, which, from the advertisements and prospectus introduced in evidence, was Utopian in character, they (W. Ross McKnight for the most part) took up the matter with one Collins, a resident of St. Louis, who was the agent of the plaintiff having general control of plaintiff's unsold land. An arrangement, not necessary to detail in this opinion, was perfected whereby W. Ross McKnight could dispose of the plaintiff's land to buyers on certain terms, and Collins, after negotiating with the plaintiff, agreed to make conveyances to such buyers.

The defendant saw the advertisements of W. Ross McKnight's scheme printed in one of the St. Louis daily newspapers. He was a clerk working in East St. Louis on a salary and was not familiar with farming or agricultural land and so informed McKnight. He called on McKnight after reading the advertisement and received a prospectus of the scheme and a circular with McKnight's name stamped upon it. This circular was one put out by the plaintiff, a number of them having been turned over to McKnight by Collins when they perfected the arrangement to deed the lands. The

prospectus issued by McKnight contains many things contained in the circular issued by the plaintiff. It covers ten pages of the printed abstract, and under heavy headings it takes up, first, a description of the general nature of the scheme, then a description of southeast Missouri, and Stoddard county, followed by headings such as, "Soil, Water and Rainfall," "Crops and Stock Growing," "Climate," "Topography," "Tract Selected," "The Colony," and lastly, the terms of settlement. It contains many representations which are promissory in nature and many that might come under the term "puffing," and others that border closely on representations of existing facts. The defendant was given an application to sign, entitling him to become a purchaser in the colonization scheme.

Defendant went with McKnight and looked over the land on a rainy day when the soil appeared black or dark. The natural color of the soil when dry was light. Defendant says, and we have no reason for doubting him, that W. Ross McKnight made the following representations which were relied on by him and which induced him to become a purchaser: That the lands were all well drained, and that this was not true. That arrangements had been made with the Iron Mountain Railway Company to place an agency at Reeds Spur which was very near plaintiff's property, and that at the time of the trial, which was several years after the representation was made by McKnight, no such agency had been established. That this land would not overflow, and that it does overflow.

We are convinced after reading the evidence that these representations were untrue and were false and that McKnight knew they were false or did not have sufficient knowledge on the subject to warrant him in asserting that they were true. This brings his conduct within the rule laid down in *Ray County Savings Bank v. Hutton*, 224 Mo. 1. c. 70, 123 S. W. 47, that a statement made carelessly without caring whether it be

true or false which proves to be untrue, is fraud, and such as that an action for fraud and deceit can be maintained by one damaged thereby. [See, also, *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783, and cases cited.]

It is true that a great many of the representations made by McKnight to defendant were in the nature of promises or descriptions of what would take place, and others that would probably escape criticism in an action for fraud and deceit because they were mere "puffing," and these of course standing alone would not sustain a charge of fraud. But where statements of existing facts are made by one knowing them to be untrue, or made carelessly, not caring whether they are true or false, followed by one being induced thereby to part with money to his damage, this will sustain an action for fraud and deceit. It is no answer to say that McKnight had faith in his project or believed in his scheme or that he himself lost a large sum of money in trying to put it through. Such a defense would make possible the perpetration of the most flagrant frauds and permit the wrongdoers to go free because he would say he believed what he was saying. Ordinary, sensible men require something of substance on which to base belief and not a mere fancy or an imagination; an expression based on such "belief" amounts to recklessness.

In order to hold plaintiff for McKnight's fraudulent representations we must examine the relation that existed between them. Collins was the *alter ego* of the plaintiff in this matter and he says that W. Ross McKnight sold this property to defendant as the agent of the plaintiff and that plaintiff paid him a commission for making the sale. McKnight was the only party that defendant dealt with, and it was McKnight who delivered plaintiff's warranty deed and carried out the contract made on December 31st, evidenced by the receipt showing that the lands were owned by plaintiff

and that it would make a warranty deed; and it was McKnight who accepted the first payment for the land together with the notes for the remainder which were made payable to the plaintiff and secured by a deed of trust, all of which were delivered by McKnight to the plaintiff. Plaintiff afterwards wrote from its home office in Connecticut demanding payment of the notes and interest as it became due. And finally, after defendant had advised plaintiff of the representations made by McKnight, plaintiff foreclosed under the deed of trust which it accepted from McKnight, bought in the property, and then brought suit for damages against the defendant. Enough was shown to evidence the relation of principal and agent. In any event, the plaintiff did accept the benefits of the bargain made by McKnight, sought to enforce the contract, and to this day, so far as the record shows, in no way repudiated the transaction which was put through by McKnight. The law is well settled that where the owner of land pays a real estate agent or broker a commission to sell it and in doing so the agent makes false representations concerning the land which induce a customer to buy, such owner although unaware of the fraud, when he accepts the benefits of the transaction is also ladened with the burdens thereof, and in such case the fraud of the agent or broker is chargeable to the owner. The cases go to the extent of holding an owner for the representations of an unauthorized agent if the owner adopts the trade made and accepts the benefits that flow from the bargain; the representations complained of, however, must be such as would naturally fall within the apparent scope of the agent's employment. In our case, the false representations were made as to the character and formation of the land, its nearness to a railroad agency, that it did not overflow, and that it had natural drainage. These things might naturally be expected to induce a sale of the property. We find in the case of *Millard v. Smith*, 119 Mo. App. 1. c. 711,

95 S. W. 940, the following quotation which the court in that case said is unquestionably the law: "There is no doubt of the general proposition that, if an agent is employed to effect the sale of lands for his principal, and he does so by means of false representations in respect to the land conveyed, even without authority or knowledge of his principal, the latter is chargeable with such fraud in the same manner as if he had known or authorized the same.'" In *Williamson v. Tyson* (Ala.), 17 So. 336, 338, this language appears: "The general rule of law that one who deals with an agent is bound to know the extent of his authority is fully recognized, and one absolutely necessary to the protection of a principal in all actions brought against him founded upon contracts made by an agent. The doctrine is equally as well established, and rests upon sound principles, that a principal who seeks to avail himself of a contract made by another for him; whether by an appointed or a self-constituted agent, is bound by the representations made and methods employed by the agent to effect the contract." [See, also: *Judd v. Walker*, 215 Mo. l. c. 334, 114 S. W. 979; *Griswold v. Gebbie*, 126 Pa. St. 353, 12 Am. St. Rep. 878; *Haskell v. Starbird* (Mass.), 25 N. E. 14; *Busch v. Wilcox* (Mich.), 47 N. W. 328; *Green v. Waddington* (N. Y.), 103 N. E. 964; *Wilson v. McCarthy* (Ore.), 134 Pac. 1189; *Clough v. Dawson* (Ore.), 138 Pac. 233; *Porter v. O'Donovan* (Ore.), 130 Pac. 393; *Grover v. Hawthorne* (Ore.), 121 Pac. 808; *J. I. Case Threshing Mach. Co. v. Lyons & Co.* (Okla.), 138 Pac. 167; *Porter v. Woods*, 138 Mo. l. c. 552, 39 S. W. 794; *Gelatt v. Ridge*, 117 Mo. l. c. 561, 23 S. W. 882; and *The Clydesdale Horse Co. v. Bennett & Son*, 52 Mo. App. l. c. 337.]

There can be no reasonable distinction drawn between a tort brought on through fraud and one brought on through negligence. The principal or master is held where the transaction was concerning his business and from the doing of which he derives benefit.

This rule works no hardship on a landowner because, in the first place, he can select who is to sell his property, and again, before accepting the negotiations of the agent he can inquire of the purchaser as to what representations if any the agent made. The reason for such rule is that where one of two innocent persons must suffer, it is nothing but right that the burden be saddled on the one who put it in the power of the wrongdoer to perpetrate the wrong. This entire question is thoroughly discussed in 2 Mechem on Agency (2 Ed.), sections 1984 to 1996 inclusive, preceded by the title, "Liability for Fraudulent Acts and Representations" (of an agent), where, in the footnotes many cases from the different States and England are cited as upholding the rule announced here. We therefore hold that the plaintiff is chargeable with the fraud worked on defendant by W. Ross McKnight.

Appellant contends that in this action of ejectment brought by it, where only title and possession of land is in issue, the defendant will not be permitted to answer by an equitable counterclaim basing his claim on the fraud alleged in the purchase of the land and seeking a cancelation of the unpaid notes for the balance and the deed of trust and the further affirmative relief by way of damages sustained on account of the fraud. Defendant's counterclaim set up the entire transaction and prayed for a cancelation. The land had already gone back to the plaintiff and the defendant made no claim to it either as to the title or the possession. The offer to return, therefore, that which he received was of necessity done away with, and he was acquiescing in plaintiff taking it back which it had done. Therefore, in order to get rescission, a cancellation and a return of the purchase money and the twelve dollars and twenty-eight cents paid as taxes while defendant owned the land, it was only necessary for him to show that a material misrepresentation which induced him to purchase had been made. For this remedy he was

not required to go further and prove the actual fraudulent intent which is essential in an action for fraud and deceit. The counterclaim did contain many items for which he claimed damages that would require proof of scienter. It is unnecessary to discuss this because on an examination of the record it can be seen that the court only allowed a judgment for an amount that covered the damages recoverable in a suit to rescind; that is, a return of the purchase money paid plus the twelve dollars and twenty-eight cents (the tax item), together with interest on the whole. There can be no doubt that the court treated defendant's counterclaim as an equitable action seeking a rescission of the contract of purchase. When sued in ejectment, defendant may answer setting up an equitable defense. This proposition requires no citation of authority. If that equitable defense strikes at and would bar plaintiff's right of recovery it is very proper that defendant should be permitted to make such defense. A defendant, however, in ejectment may interpose an equitable counterclaim under our law in certain cases where the same would not defeat a recovery by the plaintiff. In other cases we find the ruling that the only way for a defendant in ejectment to obtain the value of his improvements and purchase money, for instance, is to proceed under the occupying claimant's statute. The distinction is made in the case of *Henderson v. Langley*, 76 Mo. l. c. 228, where this language appears: "It has been repeatedly held by this court that when it appears in an action of ejectment, that the defendant has purchased land from the plaintiff, or in administration proceedings, or at sales under mortgages, and has paid the purchase money, entered into possession and made improvements in good faith, but failed to obtain the legal title intended to be sold, and could not have specific performance the owner of such legal title, or his grantee having notice of such facts, will not be permitted to eject such purchaser without ac-

counting for the purchase money and paying for the improvements made. [Shroyer v. Nickell, 55 Mo. 262; Evans v. Snyder, 64 Mo. 516; Sims v. Gray, 66 Mo. 614; Mobley v. Nave, 67 Mo. 546.] But where, as in the case at bar, the defendant enters into possession under a stranger to the title of plaintiff, in order to obtain the value of any improvements made by him, he must proceed as provided by sections 2259, 2260 and 2261 of the Revised Statutes. The claim for improvements made under the sections cited cannot be presented or heard in the action of ejectment. It is intended to be an independent proceeding, and can only be instituted after final judgment of dispossession shall have been rendered against the defendant in the suit of ejectment." The distinction is clearly shown to be that where it is sought to eject a defendant who went into possession under the title of the plaintiff and for some reason should be ejected, he may, if he had an equitable counterclaim against such plaintiff, interpose and try it in the ejectment suit; but, on the other hand, where he went into possession or is claiming title or possession through a stranger to the plaintiff, then he must recover the value of improvements made which in equity he should have by an independent action as provided by the statutes. With this distinction in mind, the cases cited by appellant, to-wit, Williams v. Sands, 251 Mo. 147, 158 S. W. 47; Fairchild v. Creswell, 109 Mo. l. c. 39, 18 S. W. 1073; Jasper County v. Wadlow, 82 Mo. l. c. 179; McClannahan v. Smith, 76 Mo. 428, and Henderson v. Langley, 76 Mo. 226, are clearly inapplicable to the facts here, where the plaintiff went on the land through and under plaintiff's title. A number of cases in this State uphold the right of the defendant in our case to maintain his equitable counterclaim. [See, The Hannibal & St. Joseph R. Co. v. Shortridge, 86 Mo. 662; Foote v. Clark, 102 Mo. l. c. 408, 14 S. W. 981; Hutchinson v. Patterson, 226 Mo. l. c. 182, 126 S. W. 403; Patillo v. Martin, 107 Mo. App. l. c.



659, 83 S. W. 1010; and *House v. Marshal*, 18 Mo. 368.] Attention is called to the distinction in *State ex rel. Jiner v. Foard*, 251 Mo. l. c. 56, 157 S. W. 619.

The land in this case was the subject of plaintiff's action. The counterclaim of defendant was connected with that subject-matter, and hence, under section 1807, Revised Statutes 1909, a proper item for counterclaim. Bliss on Code Pleading (3 Ed.), section 126, page 215, defines "subject of the action" as follows: "Thus, in an action to recover the possession of land, the 'right' is the right of possession; the 'wrong' is the dispossession; the 'object' is to obtain possession; and the 'subject,' or that in regard to which the action is brought, is the land, and usually its title." It is held in the case of *Lane v. Dowd*, 172 Mo. l. c. 173, 174, 72 S. W. 632, that the subject-matter of the action in an ejectment suit is the land, and that different transactions, if connected with the subject-matter of the action, can be joined in a petition or set up as a counterclaim. [See, also, *Grimes v. Miller*, 221 Mo. l. c. 639, 640, 121 S. W. 21.] In an action to replevin a piano, a possessory action for personal property similar to ejectment for land, it is held that the piano is the subject-matter of the action. [*Small v. Speece*, 131 Mo. App. 513, 110 S. W. 7.]

Appellant contends that defendant did not act promptly enough after discovering that the alleged fraudulent representations had been made by McKnight, and calls attention to a number of letters introduced in evidence written by defendant to McKnight and Collins with reference to the improvements being made, the roads, the slough, and the sale of the "back" forty acre tract. Defendant testified that when he bought the eighty acres McKnight agreed to relieve him of the "back" forty, and some of his correspondence relates to that. In one letter written as late as December, 1911, he said he liked the country and wanted to stay there. On May 7, 1912, a year and four months

after his purchase, he writes to McKnight and Collins informing them that he had a matter to settle with them and the plaintiff. He testified that they sent one Steele, the agent of plaintiff residing at Dexter, Mo., to him, and that he then notified Steele of the false representations made by McKnight. The evidence discloses that some time after this he brought a damage suit against plaintiff herein which was dismissed, the reason not appearing.

Appellant cites cases holding that—"Unreasonable delay, especially if accompanied with acts which recognize the contract as in existence, will be construed as condoning the fraud and acquiescing in the validity of the contract. [Harms v. Wolf, 114 Mo. App. 387, 395, 89 S. W. 1037; Lierheimer v. Insurance Co., 122 Mo. App. 374, 381, 99 S. W. 525.]"

There is, however, nothing in the record which shows that plaintiff in any way suffered or changed its position by the delay on defendant's part to assert his rights growing out of the fraud. Such being the case—the delay not having caused an altered position of the parties—this would not be a bar on the principle of laches. [Newman v. Newman, 152 Mo. 398, 54 S. W. 19; Bradshaw v. Yates, 67 Mo. 221.] In the case of Short v. Thomas, 178 Mo. App. 1. c. 419, 420, 163 S. W. 252, we said: "It has been often held that lapse of time short of the period fixed by the Statute of Limitations will not bar equitable relief where the right is clear and there are no countervailing circumstances" citing Cantwell v. Crawley, 188 Mo. 44, 86 S. W. 251; Summers v. Abernathy, 234 Mo. 1. c. 167, 136 S. W. 289; Lindell Real Estate Co. v. Lindell, 142 Mo. 1. c. 79, 43 S. W. 369; and Spurlock v. Sproule, 72 Mo. 1. c. 511. See, also, 6 Cyc. 301. We therefore hold that since defendant was unacquainted with the country to which he had moved as well as the very business he had engaged in, the delay of one year and four months did not make him guilty of laches. The most that can

be said of his letters is that they tend to contradict his statement that the representations were made and that they were untrue in that they are silent on the subject of misrepresentations. But taking into consideration his situation and the circumstances under which the letters were written, we do not believe they contradict his positive testimony concerning the fraudulent representations. We are, therefore, of the opinion that the judgment of the trial court should not be disturbed and it is accordingly affirmed. *Sturgis, J.*, concurs herein on the ground that there is sufficient misrepresentation shown to warrant a rescission of the contract. *Robertson, P. J.*, dissents.

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THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, A Corporation, Appellant, v. WILLIAM GUSEMAN, Respondent.

Springfield Court of Appeals, December 14, 1914.

**VENDOR AND VENDEE: Real Estate: Contract of Sale: Fraud of Vendor's Agent: Rescission by Purchaser. Action in ejectment.** Defendant asked to have his contract of purchase of certain real estate canceled because of alleged fraud on the part of the plaintiff's agent and prayed for damages. A judgment awarding damages to defendant is reversed with directions to enter judgment for plaintiff. (FARRINGTON, J. Dissenting.)

Appeal from Stoddard County Circuit Court.—*Hon. W. S. C. Walker*, Judge.

REVERSED AND REMANDED (*with directions*).

*Wammack & Welborn* for appellant.

(1) The respondent visited and inspected the land and there is no testimony that he was in any way

hindered from making as extensive an investigation of it as he desired. Under the circumstances he cannot allege that he was defrauded. *Morse v. Rathburn*, 49 Mo. 91; *Judd v. Walker*, 215 Mo. 337; *McFarland v. Carver*, 34 Mo. 195; *Dunn v. White*, 63 Mo. 181; *Wade v. Ringo*, 122 Mo. 322; *Bradford et al. v. Wright*, 145 Mo. App. 623; *Holland v. Anderson*, 38 Mo. 55; *Ordway v. Ins. Co.*, 35 Mo. App. 434; *Slaughter, Adm. v. Gerson*, 13 Wallace, 379. (2) Mere expressions of opinion of trade talk do not constitute fraud. Nor do mere loose talk and brag about the value of property. *Franklin v. Holle*, 7 Mo. App. 245; *Anderson v. McPike*, 86 Mo. 300; *Chase v. Rusk*, 90 Mo. App. 29. (3) A broker who takes an option to purchase real estate at a stated price is not the agent of the owner for making the sale. *Benedict v. Pell*, 70 N. Y. App. Div. 74, N. Y. Supp. 1085; *Dilworth v. Bostwick*, 1 Sweeny 581; *Southack v. Land*, 23 Misc. 515, 52 N. Y. Supp. 687.

*Mozley & Woody, Fort & Green, and K. C. Spence*  
for respondent.

(1) Respondent, not being acquainted with the soil, and the character thereof, of the locality of the land sold to him, is not precluded from recovery by the mere fact that he made a casual examination of this particular land. *Williamson v. Harris*, 167 Mo. App. 347, 151 S. W. 500; *Hindes v. Royce*, 127 Mo. App. 718, 106 S. W. 1091; *Adams v. Barber*, 157 Mo. App. 370, 139 S. W. 497; *Brownlee v. Hewitt*, 1 Mo. App. 360; *Stonemets v. Head*, 248 Mo. 243, 154 S. W. 108; *Judd v. Walker*, 215 Mo. 312, 114 S. W. 979. (2) The representations contained in the circulars given by respondent by the Illinois & Texas Land Company, and the representations made to him by E. R. Bartlett, agent of appellant, were representations of facts, and not mere expressions of opinion. *Stonemets v. Head*, supra; *Chase v. Rusk*, 90 Mo. App. 25; *Cahn v. Reid*,

18 Mo. App. 115; *Stones v. Richmond*, 21 Mo. App. 17; *Adams v. Barber*, *supra*; *Williamson v. Harris*, *supra*. (3) The Illinois & Texas Land Company, which, so far as this record discloses, was E. R. Bartlett, is clearly shown to have been the agent of appellant in the sale of this land to respondent. The sale was reported to Wm. Collins, appellant's agent for all its lands in Missouri, he received the purchase money paid, and all negotiations concerning this transaction were had with him acting for appellant. Appellant is chargeable with the fraud of said land company, or Bartlett, even though it did not know of the fraud, and did not participate in it. Appellant ratified the contract made, and, by such ratification, made the land company, or E. R. Bartlett, its agent, from the inception of the transaction. *Clydesdale Horse Co. v. Bennett*, 52 Mo. App. 333; *Porter v. Woods*, 138 Mo. 552, 39 S. W. 797; *Case v. Company*, 138 Pac. 167; *Wilson v. McCarthy*, 134 Pac. 1189; *Green v. Waddington*, 103 N. E. 964; *Taylor v. Bank*, 174 N. Y. 181; *Porter v. O'Donnell*, 130 Pac. 393; *Mundorff v. Wilkershaw*, 53 Pa. 89, 3 Am. 531; *Kirkpatrick v. Pease*, 202 Mo. 471, 101 S. W. 651; *Wann v. Scullin*, 235 Mo. 629, 139 S. W. 425; *Judd v. Walker*, 215 Mo. 312, 114 S. W. 979.

ROBERTSON, P. J.—This is an action in ejectment. Defendant answered with a general denial and a plea of fraud and deceit in the sale of the land involved, forty acres in Stoddard county, and asks judgment for damages in the sum of five hundred fifty-one dollars and fifty cents which he sought to have declared a lien on the land with an injunction against plaintiff interfering with his possession until said sum was paid. The court and defendant, over plaintiff's objection, treated the defense in the nature of an action in equity, but as defendant is entitled to no relief either in law or equity, plaintiff is not prejudiced on

this point. The judge called a jury to pass on certain issues of fact. The jury responded to the interrogatories after which judgment was entered for the plaintiff for the possession of the land, one hundred dollars damages and finding the monthly value of the rents and profits of the land to be five dollars. The finding for defendant was that he had been damaged in the sum of five hundred dollars and seventy-five cents, for which, less the one hundred dollars, judgment was entered in his behalf. The plaintiff has appealed.

The plaintiff was the owner of many thousand of acres of land in Stoddard county which it acquired as the result of loans and was endeavoring to sell it. It had spent large sums on building roads, residences and encouraged the construction of extensive drainage systems for which, of course, its land was taxed. In its efforts to dispose of this land it had printed for distribution advertising folders setting forth in fulsome language the advantages and possibilities of this locality. One E. R. Bartlett, a real estate dealer located at Springfield, Illinois and operating under the name of the Illinois & Texas Land Company undertook the sale of the land here involved.

The plaintiff held a deed of trust on the land as a result of the sale to one Rich. Default having been made by Rich the plaintiff was offering to sell the property. Bartlett called defendant's attention to it, who, with Bartlett, visited the land and afterwards entered into a contract under date of February 20, 1912, with the Illinois & Texas Land Company, to buy it for two thousand dollars, paying two hundred and fifty dollars cash and the balance in deferred payments. The defendant understood that the title to the land was not vested in Bartlett or his company and there was written on the back of the contract the following:

"By agreement \$12 is to be allowed Second Party as a credit out of the \$1750 at the time of closing deal

for his railroad fares paid at time of going to examine the land before purchasing.

"It is understood and agreed that the land herein is to be conveyed clear of all Mortgage or Liens except the \$1750 due from the Second Party, and in case of failure the First Party to so convey within thirty days from date of payment of earnest money, then the second party may elect to have his \$250 earnest money returned to him and cancel contract." The defendant inquired of other parties about this land before buying. He was about thirty-three years of age, a farmer, and when he visited the land also examined several other tracts, but selected this one. He moved onto the land April 3, 1912, and later his attorney wrote Bartlett the following letter which defendant signed and delivered, as he testified, by "sending" it to Bartlett, but which Bartlett testified was handed to him by defendant August 7:

"Dudley, Mo., July 23, 1912.

To The Illinois & Texas Land Company.

"E. R. Bartlett, President.

"You are hereby notified that I have cancelled and do hereby cancel the contract entered into with you on the 20th day of February, 1912, for the purpose of the northwest quarter of the southwest quarter of section thirty-two (32) in township twenty-six (26) range nine (9), containing forty (40) acres, at fifty (50) dollars per acre a total of \$2000. \$250 cash in earnest money. The balance of \$1750 payable in ten years. \$175 the first January of each year and every year until paid in full, deferred payments to bear five per cent per annum.

"Upon the execution of said contract written and signed in triplicate of which you have two copies, which said earnest money was duly paid on said February 20, 1912. At which time you undertook and agreed to convey said land or cause to be conveyed said land by good and sufficient warranty deed within thirty days

from the date of payment of said earnest money, \$250. And in failure to do so then I the second party, might elect to have and received his said \$250 earnest money, return to him and cancel the contract. Which said contract you have forfeited and have wholly failed to execute and perform on your part to the injury and damages of the said party of the second part in this: Party of the second part moved from the State of Illinois to take said land and carry out his contract in that behalf at a cost of \$78.50, and has cleared three acres of land on said premises, reasonable worth \$4.50 per acre and the rent for the present year making a total sum of \$92. And deduct therefrom the rent of the cleared land on said premises, twenty acres at \$2.50 per acre total \$50, leaving a balance of \$42 due this party of the second part in addition to said \$250 earnest money and interest thereon at the rate of six per cent per annum. All of which this party of the second part demands immediate payment. Party of the second part agrees to quit possession of said premises on or before the 31st day of Dec., 1912. and yield peaceable possession to party of the first part. Witness my signature on this the day and date first above written.

“WILLIAM GUSEMAN.”

After writing this letter defendant continued to reside on the land, cleared some of it of timber and continued to make improvements thereon, for the value of which he is seeking to recover in this case. He also, after his attempted forfeiture, sowed wheat on the land. Before this letter was written or delivered defendant knew plaintiff was having some trouble in getting matters adjusted with Rich, but before this letter was written the plaintiff made and tendered a deed to defendant which defendant was advised he could get upon executing the deed of trust for the deferred payments as provided for in the contract, with some slight variation as to payments to which defend-



ant did not object. Under date of October 23, 1912, defendant wrote to a party offering to sell the land at fifty-five dollars an acre, stating that by doing so he could save the prospective purchaser three hundred dollars. The testimony of witnesses fixed the value of the land at the date of trial from ten to seventy dollars per acre. At the latter figure one witness testified that he bought land similar to that contracted for by defendant. Bartlett first negotiated with Rich for the purchase of the land who asked forty-two dollars and fifty cents per acre, and that was the price for which Bartlett was getting it from plaintiff. This land is located between two drainage ditches. Bartlett testified, and defendant did not deny it, that he offered defendant a profit of \$2.50 an acre for the land, which defendant refused.

To relate all of the acts of fraud charged against plaintiff as the result of Bartlett's conduct would require too much space, but conceding for the purpose of this opinion that plaintiff is responsible for all Bartlett did and said, we can give no clearer idea of the fraud charged than to quote from respondent's brief wherein the matters relied on here are condensed thus:

"The testimony shows that appellant advertised its lands, of which the lands in controversy had been, and was a part, as the richest soil on earth, twenty to eighty feet deep and exhaustless in fertility; that it was supplied with pure water; that it was high, well-drained bottom land, and, in fact, the cream of the continent; that it was the land of promise and fulfillment; that it was the land of big bargains and bigger crops; that the land produced two crops yearly, and sometimes more; that it was the best farm proposition ever offered to a farmer, renter or investor; that it would yield yearly fifteen to twenty-five per cent profit in crops, and the like amount in advanced values, with no risk to the purchaser, that for every dollar the pur-

chaser invested, it would loan him three at five per cent only, and guarantee his title; that the purchaser would thus be able to read twenty-five to forty per cent profit on every four dollars, or better than 100 per cent on his actual investment, and that if the purchaser was a home builder he could pay for his lands from the crops thereon; that the natural drainage of said land was unusually good, the water passing easily quickly down in case of heavy rainfall, and that all the strata were sufficiently fine to bring up water by capillary attraction when it was needed, and that the climatic conditions, and pure water, made it truly a land of health, good alike for man, beast and crops."

As to the alleged misrepresentation that the land was supplied with pure water the following occurred in the trial, which is a specimen of the disposition that prevails throughout the case on defendant's part: "Q. What, if anything did Bartlett say to you about the supply of pure water on this forty acres of land? A. He said it was the best that could be got. Q. What was the truth about it? A. Well, the deep wells—. Q. First, how did you get water?" Then the testimony goes off into the method of driving down pipes to get surface water, which, of course, was not good. The adroit interruption of the witness when he was about to proceed to show that there was a good run of water convinces me that there is nothing in this charge.

While the representations of plaintiff and Bartlett of this land was not what appeals to the conscience of every man as a commendable method of attracting attention to salable lands, yet in the absence of the wicked design to defraud I am convinced that there is no authority to hold them liable for fraud or deceit. [Wilson v. Jackson, 167 Mo. 135, 66 S. W. 972; Adams v. Barber, 157 Mo. App. 370, 392 and 393, 139 S. W. 489; South Missouri Pine Lumber Company v. Crommer, 202 Mo. 504, 521, 101 S. W. 22; Kilpatric v. Wyler, 197 Mo. 123, 159 and 160, 95 S. W. 213; Brown v. South

Joplin Lead and Zinc Co., 194 Mo. 681, 700, 92 S. W. 699; Cornwall v. McFarland Real Estate Co., 150 Mo. 377, 383, 51 S. W. 736; Peters v. Lohman, 171 Mo. App. 465, 156 S. W. 783.]

The case of Stonemets v. Head, 248 Mo. 243, 154 S. W. 108, relied on by respondents presents an entirely different state of facts than are prevalent here. In that case a wicked design was prominent in every act of the party against whom complaint was made. We cannot find in the case at bar that there was present in the representations of plaintiff or Bartlett any evil intent. A reading of the above cited cases will disclose that the law does not brand as fraudulent the mere "vague laudatory flourishes" of a seller; ordinarily and in this case, representations as to value are mere expressions of opinion, and there is great doubt if the values were over stated. The statements as to probable profits, depth of soil, no risk to purchaser, and like assertions were nothing more than the statement of the opinion of the seller. It is also evident that defendant did not when he had the letter of July 23, 1912, written, consider that he had been swindled, because in that letter he bases his claim on the grounds of the default of Bartlett under the contract of purchase, although Bartlett had offered to comply therewith, with the exception of the variation in the installment notes as above mentioned. And, as before stated, after writing this letter defendant proceeds with the improvements thereon. In the letter he charges for clearing three acres of land and at the trial he testified that twelve acres were cleared; thus he must have cleared nine acres after writing the letter instead of two as he testified at the trial. He proposed to retain possession of the land until December 31, 1912, and to pay as rental for the cleared land from April 3, 1912, to that time \$2.50 per acre and this for land, as he testified, worth only ten dollars per acre.

Convinced, as I am, that defendant is entitled to no relief, either at law or in equity, the judgment in his behalf will be reversed and the cause remanded with directions to set aside the judgment as it now stands and to enter one in behalf of plaintiff in the same form and substance and as of the date of the present one and against the defendant on his answer and counterclaim.

*Sturgis, J.*, concurs in result and filed separate opinion. *Farrington, J.*, dissents and files separate opinion.

STURGIS, J.—I concur in the result reached by ROBERTSON, P. J., for these reasons: It is conceded that neither the plaintiff company nor its authorized agent, Collins, authorized, participated in or knew of the alleged fraudulent promises and alleged misrepresentations made by Bartlett in selling the land in question to defendant. It is also conceded that Bartlett was not the authorized agent of this plaintiff to make a sale of this land. Whether he had or had not been the plaintiff's agent in selling other lands is not material. At the time Bartlett sold this land to defendant, the plaintiff was not the owner thereof. The land was then owned by one Rich, though the plaintiff held a deed of trust on the same which it expected to foreclose unless Rich paid the amount secured and plaintiff might or might not become the purchaser there at and thus acquire the title. This is what it did do, but not until sometime after Bartlett had made a contract of sale to the defendant.

Bartlett was a land broker operating under the trade name of the Illinois and Texas Land Company and was looking for lands to buy and sell. He made a contract of sale to defendant in his own name, or rather his trade name. He did not purport to sell the land as agent for another but as his own. At that time he was

expecting to buy it from the then owner, Rich, and had some arrangement or negotiations-at least with Rich to that effect. It may have been and doubtless was his intention, if he could not buy from Rich, to buy at the foreclosure sale under the deed of trust or from plaintiff in case it became the purchaser at such sale. He knew that plaintiff was wanting to sell all of its lands of this character and was in that business and had a practically fixed schedule of prices on such lands and would sell to most anyone offering the price. He knew that, if plaintiff bought back this land under the deed of trust, it would most certainly make a price substantially sufficient to make itself whole. With this knowledge he took chances on making a sale to defendant as if he was the then owner.

After plaintiff did acquire the property, it refused to carry out the terms of sale made by Bartlett to defendant as it had a right to do. It would do nothing more than agree to sell to Bartlett on the terms fixed by itself. "It is not true that an owner may not declare his price to whom he will, without the hazard of paying commissions to (that is making agents of) those who volunteer, unasked, to send him a purchaser on his own terms." [Benedict v. Pell, 74 N. Y. Supp. 1085, quoting from Pierce v. Thomas, 4 E. D. Smith, 354.] The fact, therefore, that plaintiff was willing to and did sometime later execute and offer a deed on the terms fixed by itself to the defendant, as a purchaser found by Bartlett, did not make Bartlett its agent. The fact that an owner of land in agreeing to sell to another on his own terms also agrees to and does make a deed to any third party designated by such purchaser does not make such purchaser the agent of the owner for the purpose of selling to the party receiving the deed.

In this case Bartlett had agreed with defendant to sell him the land on one cash and nine annual payments, while plaintiff would sell to Bartlett only on one cash and seven annual payments and with the payments

bearing a different rate of interest. Bartlett had sold to defendant at a larger aggregate price than plaintiff was selling to him and, by making the last two payments cover the surplus and be payable to Bartlett for his profits, he sought to make the two contracts the equivalent of each other. Plaintiff was willing to do this so far as it could and preserve its own terms of sale. The defendant went into possession under his purchase from Bartlett and because Bartlett could not and did not comply with his contract of sale to defendant, the defendant repudiated the sale and it was never consummated and no deed passed from plaintiff to either Bartlett or defendant. The plaintiff received the first cash payment due it as coming from Bartlett, which was a less amount than the cash payment made by defendant to Bartlett, and the fact that plaintiff knew that Bartlett was using part of the money received from defendant in paying plaintiff the first cash payment can make no difference.

Under these facts, the rule that one who accepts the benefits of a transaction consummated by an act of an unauthorized agent, or the unauthorized act of a real agent, thereby ratifies it and must accept the burdens and be responsible for the methods and means used by such agent, whether known to the principal or not, has no application here. In order to be a ratification the person acting must have professed at least to have been acting for the person ratifying. If a person avowedly acts for himself and not for another there is no act of agency for such other to ratify. A ratification is an agreement, express or implied, to adopt an act performed by another for the one ratifying it. "It applies only 'where a person acting as agent for another professes, though without authority, to contract for him.' " [Planing Mill Co. v. Brundage, 25 Mo. App. 268, 273.] See also Steinkamper v. McManus, 26 Mo. App. 51, 53. For the same reason one who has an option on land from the owner is not the agent of

such owner in making a sale of the land, though the option agreement includes an agreement that the owner will make a deed to anyone designated by the holder of the option. In such case the holder of the option acts for himself in selling the land and not for the owner. [Southack v. Lane, 52 N. Y. Supp. 687.] In this case Bartlett professed to act for himself in selling this land to defendant and the defendant so contracted with him, and Bartlett was not the plaintiff's agent either in fact or by ratification.

### DISSENTING OPINION.

FARRINGTON, J.—The plaintiff, a foreign corporation, authorized to do business in Missouri, some time prior to February 20, 1912, had sold forty acres of land situate in Stoddard county, in this State, to one Rich, and had taken a deed of trust as security for part of the purchase price. At that time Rich was not in possession of the land but plaintiff had not foreclosed under its deed of trust; however, it was looking for a purchaser for the land when it should perfect title in itself.

The evidence shows that E. R. Bartlett, a real estate broker of Springfield, Illinois, was disposing of lands belonging to plaintiff in southeast Missouri, and that on his negotiations deeds were being made by plaintiff to customers he produced that were willing to make terms of purchase satisfactory to the plaintiff. A few days prior to February 20, 1912, Bartlett took the defendant, an Illinois farmer, to Stoddard county to look over the land. They drove out to the place and were there according to defendant's testimony some ten or fifteen minutes. They returned to Springfield, Illinois, and entered into a contract wherein the Illinois & Texas Land Company (a real estate partnership principally owned and controlled by Bartlett who carried on the negotiations with defendant)

agreed to sell the farm for a consideration of two thousand dollars, and two hundred and fifty dollars of the purchase price was paid at the time, the contract providing for securing the deferred payments. The following provision was in the contract: "By agreement \$12 is to be allowed second party as a credit out of the \$1750 at the time of closing deal for his railroad fares paid at time of going to examine the land before purchasing. It is understood and agreed that the land herein is to be conveyed clear of all mortgage or liens except the \$1750 due from the second party, and in case of failure of first party to so convey within thirty days from date of payment of earnest money, then the second party may elect to have his \$250 earnest money returned to him and cancel contract."

On March 26, 1912, defendant, not yet having received a deed, moved from Illinois to the land in Stoddard county. He testified that Bartlett told him at that time that the deed had been slightly delayed but would be forthcoming in a few days, and that acting on this assurance he moved onto the place and commenced work.

On February 23, 1912, three days after the contract was signed, the Illinois & Texas Land Company, by E. R. Bartlett, president, wrote the following letter enclosing the contract he had made with defendant:

"Springfield, Ill.

"Feb. 23, 1912.

"Mr. William Collins or D. C. Steele,

"St. Louis, Mo.

"Dear Sirs: As I wrote you Wednesday, I contracted a sale of the W. F. Rich place to a Mr. William Guseman of Cornland, Ill., but could not get into the bank until today to get the money.

"If I understand you right, Mr. Steele, Mr. Rich has left his deed with you people, that is has turned the place over to you, and you said to sell at \$40 net to you which I did.



"I enclose herewith a draft for \$185 as first payment, will make \$15 more if desired making \$200 first payment, and I will take a second mortgage for the balance due me.

"As I spoke to Mr. Collins just before he was taken sick about rearranging the mortgage on this tract to make it five per cent money it will perhaps be best to do so, even if you add in the difference between the five per cent and six per cent to the principal dividing the amount into ten equal payments, but if you prefer to let the old mortgage stand and deed subject to it I can arrange it by making the difference in interest in my second mortgage.

"It might be as well to make the deed direct to me, E. Russell Bartlett, and I will execute the new papers and then deed to Mr. Guseman subject thereto, or if you prefer make them direct to Mr. Guseman.

"If you have an abstract of this tract please send it to me and I will copy and return it, if you have not you had better send and have it made in connection with the J. C. Walker abstract in the same section, this can be done with little extra cost as they will run the same.

"Not knowing which of you I will find in the office I make the draft payable to Mr. Collins,

"Yours respectfully,

"THE ILLINOIS & TEXAS LAND CO.,

"By E. R. BARTLETT, Pres.

"P. S.—I attach copy of my sale contract."

It appears in the evidence that William Collins was the general agent in charge of all the plaintiff's lands in Stoddard county and that Steele was his assistant.

It will be borne in mind that, as this letter disclosed, the net price to the plaintiff was to be forty dollars an acre and the price Guseman was paying to Bartlett was fifty dollars an acre; the difference is the

amount of compensation the agent (Bartlett) received for making the sale.

This letter, as well as the testimony of Collins, shows that he (Collins) received and kept one hundred and eighty-five dollars out of the initial payment of two hundred and fifty dollars.

The plaintiff had some trouble with Rich and could not obtain a deed from him. It foreclosed the Rich deed of trust, buying the land, and afterwards prepared a warranty deed in which the grantee was defendant Guseman and also prepared the deed of trust and notes for Guseman to sign, all of which was carrying out the sale contract made by Bartlett with the defendant.

On July 23, 1912, before any deed had been offered the defendant under the contract, defendant wrote the following letter to the Illinois & Texas Land Company electing to cancel under his contract and asking for a return of the two hundred and fifty dollars with other items therein shown:

“Dudley, Mo., July 23, 1912.

“To the Illinois & Texas Land Company,

“E. R. Bartlett, President.

“You are hereby notified that I have canceled and do hereby cancel the contract entered into with you on the 20th day of February, 1912, for the purchase of the northwest quarter of the southwest quarter of section thirty-two, in township twenty-six, range nine, containing forty acres, at fifty dollars per acre, a total of \$2000. \$250 cash in earnest money. The balance of \$1750 payable in ten years. \$175 the first day of January of each year and every year until paid in full, deferred payments to bear five per cent per annum.

“Upon the execution of said contract written and signed in triplicate of which you have two copies, which said earnest money was duly paid on said February 20, 1912. At which time you undertook and agreed to convey said land or cause to be conveyed said land

by good and sufficient warranty deed within thirty days from the date of payment of said earnest money, \$250. And in failure to do so then I, the second party, might elect to have and receive his said \$250 earnest money, returned to him and cancel the contract. Which said contract you have forfeited and have wholly failed to execute and perform on your part to the injury and damage of the said party of the second part in this: Party of the second part moved from the State of Illinois to take said land and carry out his contract in that behalf at a cost of \$78.50, and has cleared three acres of land on said premises, reasonably worth \$4.50 per acre and the rent for the present year, making a total sum of \$92. And deduct therefrom the rent of the cleared land on said premises, twenty acres at \$2.50 per acre, total \$50, leaving a balance of \$42 due this party of the second part in addition to said \$250 earnest money and interest thereon at the rate of six per cent per annum. All of which this party of the second part demands immediate payment. Party of the second part agrees to quit possession of said premises on or before the 31st day of December, 1912, and yield peaceable possession to party of the first part. Witness my signature on this the day and date first above written.

“WILLIAM GUSEMAN.”

Some time after this, defendant was offered the deed, heretofore referred to, prepared by plaintiff, which he refused. There is evidence in the record that the deed which plaintiff prepared to convey title to Guseman was kept in its office and not turned over to Bartlett.

The plaintiff, having bought the land under the Rich foreclosure, and the defendant refusing to carry out the contract, this suit in ejectment was instituted.

The defendant in no way disputes plaintiff's title. He was in possession when the suit was brought. His answer set up an equitable counterclaim stating a great

many facts to the effect that plaintiff's agent, Bartlett, misrepresented the facts with reference to this place which misled him to his injury. The view I take of the case requires no discussion of that question. Defendant's answer, after setting up the transaction and the alleged fraud, concludes as follows:

"Defendant avers that after he had been induced as foresaid to make said contract of purchase and to lay out and expend the sums of money aforesaid and to move onto and clear up and improve said land as aforesaid, and as hereinafter set out, plaintiff and its said agent failed and refused to deliver to this defendant an abstract of the title to said land showing a fee simple title in him subject to the balance of the purchase price due plaintiff thereon, and failed and refused to make, execute and deliver to the defendant a warranty deed conveying to him the title in fee to said land, conditioned in accordance with the terms of said contract, as they had represented and agreed they would do whereupon on the 23d day of July, 1912, defendant duly notified plaintiff's said agent of his intention to forfeit said contract of purchase, as he had the right to do under its terms and provisions, and demanded the return to him of said sum of \$250, paid to plaintiff as aforesaid, and a compromise sum of his damages in the premises, with the view of avoiding the delay and expense of litigation in court, but defendant says that plaintiff wholly disregarded his reasonable and just demand, refused to repay to defendant said sums or any part thereof and in furtherance of its original designs in attempting to retake from this defendant by this proceeding in ejectment said land, and thus and thereby appropriate defendant's money and the fruits of his toil as aforesaid without recompense to him or cost to them.

"Defendant avers that the sum he has expended and labor he has performed and its value by reason of the premises, are as follows:

Railway fare paid from Cornland, Ill., to Stoddard county, Mo., to look at said land....	\$ 12.00
Paid under the terms of said contract of purchase to plaintiff in cash .....	250.00
Interest on above sum for one year and ten months at six per cent per annum.....	25.00
To expense of moving from Cornland, Ill., to Dudley, Mo. ....	73.00
To building thirty rods of woven wire fence on said land .....	15.00
To building one smokehouse on said land.....	15.00
To building one chickenhouse on said land....	15.00
To building one closet on said land .....	1.50
To clearing twelve acres of land at \$10 per acre,	120.00
To clearing 5 acres of said land at \$5 per acre,	25.00

“Making a total of \$551.50 due this defendant, and he prays that an accounting be had between he and the plaintiff, and that he recover said sum of \$551.50 from said plaintiff, and his costs herein laid out and expended, and that said sum so recovered may be declared a lien on said land and that said plaintiff may be enjoined and restrained from interfering with the possession of said premises until such judgment and costs are paid, and for such other and further and general relief as, in equity and good conscience the court may deem meet and proper.”

On reading this record I am convinced (and will not discuss the details) that Bartlet was the representative, agent, or broker of the plaintiff for the purpose of disposing of its lands in Stoddard county, and that although the actual title to this land was not in the plaintiff when the contract was executed, the plaintiff did hold a deed of trust on the land, knew that Rich the owner had defaulted and abandoned the land, and that they were negotiating with him with reference to acquiring a deed from him. Plaintiff did accept Bartlet's trade and finally offered to put it through, and as a result is now suing in ejectment because Guse-

man would not carry out the deal which Bartlett had made with him for plaintiff. Their agent, William Collins, who had full control of the business for plaintiff in Missouri, having been given a general power of attorney to manage and sell lands, received and kept one hundred and eighty-five dollars of the first payment, sent to him by Bartlett together with the contract made with Guseman. This general agent of the plaintiff—Collins—testified that during the year 1910 arrangements were made with Bartlett to sell plaintiff's land in Stoddard county and that the negotiations finally culminated in plaintiff giving Bartlett options to sell the land at certain listed prices. The following excerpt from the testimony of Collins I think clearly shows that Bartlett or the Illinois & Texas Land Company was acting as the agent of the plaintiff, and that as a scheme to sell the land they armed Bartlett with options to go out and find customers for plaintiff: "Q. Well, you gave him the option? A. We finally gave him the option to sell these lands at a listed price for certain lands. Q. To sell to whom and from whom? A. To customers he could find. Q. To sell them to any customers he might find, and for whom? A. If you would let me finish the substance of the correspondence— Q. Tell who he was to sell them for? A. For the Company. Q. Now, go ahead and tell what you want to about it? A. That's all. Q. In the correspondence you had with the Illinois & Texas Land Company who were you representing? A. The Connecticut Mutual Life Insurance Company. Q. Mr. Bartlett, in the name of the Illinois & Texas Land Company sold other lands under this arrangement for the Company, did he not? A. Yes, sir."

The evidence justified the conclusion that Bartlett was the agent of the plaintiff and that in making the contract with Guseman on February 20, 1912, he was acting for the plaintiff and that the plaintiff received the major portion of the benefits derived by reason

of that contract on that date. It stands admitted that up to July 23, 1912, plaintiff had not furnished defendant with the deed contracted for. His letter of that date is a clear rescission of the contract on his part and expresses a determination to cancel the contract. This he had a clear right to do under the plain provision of the contract of February 20th; and merely because he had waived a cancelation up to that time would not prevent him from canceling on that date as his delay caused no harm to the plaintiff—plaintiff being responsible for the delay. It was entirely optional with him to cancel at any time after thirty days when the plaintiff failed to carry out its agreement with him and because he did not cancel at the end of the thirty days and because he did go on the farm and give plaintiff a longer time in which to perfect the title and make him a deed are not acts on his part that avail the plaintiff anything. Plaintiff cannot complain because defendant did not require it to strictly comply with the contract. He was on the land, working and improving it, and plaintiff was advised of that fact all the time. His counterclaim, while it does deal with questions of fraud and fraudulent representations and seeks to recover some items on that account, does contain averments enough to give him relief on his cancelation of July 23d. The counterclaim contains items of damage which I do not think are justified in this case. His letter fixing the time of cancelation enumerates his items of damage and what he asks a return of, and to this he must be restricted. A plaintiff in ejectment is not entitled to possession in a case where the defendant went into possession under the plaintiff's chain of title without restoring to defendant his purchase money and the reasonable value of improvements made while in possession. [See, *The Hannibal & St. Joseph R. Co. v. Shortridge*, 86 Mo. 662; *Foote v. Clark*, 102 Mo. l. c. 408, 14 S. W. 981; *Hutchinson v. Patterson*, 226 Mo. l. c. 182, 126 S. W. 403;

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Insurance Co. v. Guseman.

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Patillo v. Martin, 107 Mo. App. l. c. 659, 83 S. W. 1010; House v. Marshall, 18 Mo. 368; and State ex rel. Jiner v. Foard, 251 Mo. l. c. 56, 157 S. W. 619.]

I think defendant is entitled to the two hundred and fifty dollars earnest money, the seventy-three dollars as shown by his counterclaim for expense of moving from Illinois to Missouri, and the thirteen dollars and fifty cents for clearing three acres of land, together with interest on these amounts to the date of suit, making a total of three hundred and sixty-eight dollars. The plaintiff was given a judgment for restitution and one hundred dollars damages for rent during the time defendant held the land. From this judgment defendant does not appeal.

All the other questions raised by appellant, such as the right to counterclaim in this action, laches, etc., were discussed in an opinion of this court handed down on December 12, 1912, in a case growing out of a similar transaction and argued and submitted with this case, wherein the Connecticut Mutual Life Insurance Company was appellant and Arthur P. Carson was respondent.

The defendant recovered in the trial court five hundred dollars and seventy-five cents. I think the judgment should be affirmed on condition that defendant by a written remittitur reduce the amount of his judgment so that it will be for three hundred and sixty-eight dollars, and in the event of his failure so to do, the judgment should be reversed and the cause remanded.



STATE OF MISSOURI, at the Relation and to the Use of T. C. PINKLEY, Respondent, v. BESSIE YOUNT, SEIBERT YOUNT, WLL E. YOUNT, FANNIE Y. DeLISLE, DICK DeLISLE, IONA Y. DAVIS, J. W. CRONAN, IDA M. CRONAN, R. LEE WLLIAMS, W. E. DAVIS and FREDDIE Y. WILLIAMS, Appellants.

Springfield Court of Appeals, December 14, 1914.

1. **ATTACHMENTS: Bond: Liability of Sureties: Variance in Name in Caption and Condition of Bond.** The first name of the plaintiff was correctly given in the caption of the bond in attachment but incorrectly given in the condition. Where no showing was made that there had ever been any other action in the county by the person named in the condition the defendant in the attachment suit can recover against the sureties on the bond after the attachment is dissolved.
2. **EVIDENCE: Secondary Evidence: Discretion of Trial Court in Admitting.** It is largely within the discretion of the trial court when secondary evidence should be admitted and when sufficient proof of the loss of a written instrument has been made.
3. ———: ———: **Preliminary Proof.** In an action on an attachment bond, proof of the loss of the papers in the attachment suit considered sufficient to authorize the admission of secondary evidence as to their contents.
4. **ATTACHMENTS: Bond: Sureties Liable for What.** After a dissolution of an attachment by judgment for defendant on the merits, the sureties on the attachment bond are liable for the traveling expenses, loss of time, cost of taking depositions and attorney's fees expended in defending the attachment.
5. ———: ———: **Conditions: Meaning.** The condition in an attachment bond that the plaintiff would "prosecute her action with effect" means "with success."

Appeal from New Madrid County Circuit Court.—*Hon. Frank Kelly, Judge.*

**AFFIRMED.**

*Oliver & Oliver for appellants.*

(1) The appellants as accommodation sureties are favorites of the law and have a right to stand upon the strict terms of their obligation. *State v. Thomas*, 19 Mo. 616; *Douglass v. Reynolds*, 7 Peter (U. S.) 113; *Brant on Suretyship and Guaranty*, sec. 79. (2) The statute was not designed to give damages beyond the natural and approximate damages resulting from the running of the attachment. This is the language of the Supreme Court in a direct construction of the statute. *State ex rel. v. Thomas*, 19 Mo. 613; *State ex rel. v. Fargo*, 151 Mo. 291. (3) Our courts have uniformly held that where plaintiff fails on the plea in abatement his liability on the bond does not extend to defendant's expenses in the trial on its merits. Upon what possible reason should he be held liable if he be successful on the plea in abatement, either by reason of his own activity or the slothfulness of his adversary? *State ex rel. v. Fargo*, 151 Mo. 291.

*Thomas Gallivan, R. L. Ward and L. L. Collins* for respondent.

(1) In Missouri and Mississippi, if the attachment is not dissolved until final judgment on the merits, and a contest upon them was necessary to procure its dissolution, there may be a recovery of the whole costs and expenses. 2 *Sutherland on Damages*, sec. 516, p. 1416. Citing: *State v. McHale*, 16 Mo. App. 478; *State v. Thomas*, 19 Mo. 613, *Am. Dec.* 580; *State v. Beldsmeier*, 56 Mo. 225; *State v. Stark*, 75 Mo. 566. (2) Necessary attorneys fees, railroad fare, traveling expenses, lodging and board and expense in attending trial, visiting and consulting counsel and looking up evidence and preparing for trial, are proper items of damage for an attachment suit. *State ex rel. v. Allen*, 144 Mo. App. 243; *State ex rel. v. Beldsmeier*, 56 Mo.

226; Talbott v. Plaster Company, 151 Mo. App. 544. (3) The bond covers any damages in any proceeding connected with or growing out of the suit. Moses et al. v. State, 10 Mo. 215; State to use v. O'Neil, 4 Mo. App. 221; State v. McHale, 16 Mo. App. 478; Section 2335, R. S. 1909. (4) When secondary evidence should be admitted and when sufficient proof of the loss of a written instrument which would be admissible evidence if obtainable is largely in the discretion of the trial court. Liles v. Liles, 183 Mo. 326.

FARRINGTON, J.—This is a suit on an attachment bond in which the relator T. C. Pinkley recovered a judgment for \$916.30. The verdict of the jury was as follows:

“We the jury find the issues for the plaintiff, relator, and assess his damages as follows:

Plaintiff's expenses traveling and hotel bill..	\$ 85.30
Plaintiff's loss of time .....	60.00
For taking depositions .....	21.00
For attorney fees for defending attachment..	750.00

And find the total amount of plaintiff's damages to be \$916.30.”

Judgment thereon was rendered and defendant appealed.

A suit was begun by Bessie Yount against the relator herein seeking to recover damages for slander alleged to have been uttered by relator, and a writ of attachment was sued out in aid of the action and an attachment bond given in the sum of ten thousand dollars, signed by “Besse” Yount and a number of sureties (the appellants herein) which bond was approved by the circuit clerk. The caption of the bond was as follows: “Bessie Yount, plaintiff, against T. C. Pinkley, defendant—attachment in a Civil Action.” In the condition of the bond it is recited that “whereas Bess Yount as plaintiff is about to commence a suit by attachment,” etc. The bond is in the form prescribed

by statute and provides that plaintiff "shall prosecute her action without delay, and with effect."

All the papers in the slander and attachment suit were missing from the circuit clerk's office except the attachment bond and a few unimportant papers connected with the case which had been placed in the safe by the clerk. In the file where these attachment papers were usually kept was found the receipt of James V. Conran, the attorney for Bessie Yount in the slander suit. The evidence showed that he was dead at the time of this trial. The circuit clerk testified that he had searched his office and was unable to find the papers. Likewise, M. J. Conran, testified that he was the administrator of the estate of James V. Conran and that he had been unable to find these papers.

Relator offered in evidence the record entries in the circuit clerk's office showing that an answer was filed in the slander suit on September 18th and that on the same day a plea in abatement was filed. It was shown by an entry made on September 28th that the court made an order striking from the files the plea in abatement, reciting that the defendant having answered to the merits waived the plea in abatement, and reciting that the attachment would be sustained. This left the slander suit standing for trial on the merits with the attachment sustained.

The defendant employed a firm of lawyers in New Madrid county and a firm in Pemiscot county to defend him in the slander suit, as well as an attorney at Sedalia, Mo., who took some depositions in the case.

The testimony of the relator supports the finding of the jury as to the items hereinbefore set out.

When the slander suit was tried on the merits it resulted in a judgment for the defendant (relator). A motion for a new trial was filed by Bessie Yount which was withdrawn and no further steps taken. There remained the judgment on the merits in the slander suit

in defendant's (relator's) favor, which necessarily dissolved the attachment.

In this action on the attachment bond the relator dismissed as to defendant Bessie Yount and took judgment against the other defendants—the other signers of the attachment bond who were sureties.

The appellants contend, first, that as they were sureties they are entitled to the benefit of the rule *strictissimi juris* and the condition of the bond was that they would be bound in the suit in which "Bess" Yount was plaintiff, they cannot be held on the bond since it is shown that the plaintiff was Bessie Yount. We have stated that the bond was entitled "Bessie" Yount and there can be no doubt that the bond was made to respond in case any damages were occasioned by such suit. There is no showing or attempt to show that there was ever any other suit in that county wherein "Bess" Yount was plaintiff and in which appellants were not sureties on a bond. Without further discussion we hold that there is no merit in this contention.

Appellants assign error in the admission of oral testimony as well as the record entries because, they contend, it was not sufficiently shown that the original papers were lost. The clerk testified that he had searched his office and all he could find was the receipt for the papers in the attachment suit, and the administrator of the attorney's (Conran's) estate testified that he had made a search and could not find the papers among his intestate's effects. It is largely within the discretion of the trial court to determine when secondary evidence should be admitted and when sufficient proof of the loss of a written instrument has been made. [Liles v. Liles, 183 Mo. 326, 81 S. W. 1101.] It is held in the case of Eminence Land & Min. Co. v. Current River Land & Cattle Co., 187 Mo. 420, 86 S. W. 145, that those who have read a sheriff's return prior to the loss may testify concerning it where such return

is shown to be lost. A case very similar to the one before us is that of *State ex rel. Rigby v. Goodhue*, 74 Mo. App. 162, wherein the question of lost papers is discussed and cases cited. This point is ruled against the appellants.

The items found by the jury are such as may be recovered in a suit on an attachment bond where the condition has not been fulfilled. [*State ex rel. Bigby v. Goodhue*, supra; *State ex rel. Cole v. Shobe*, 23 Mo. App. 474; *State to use of Burton v. McKeon*, 25 Mo. App. 667; *State to use of Roe v. Thomas*, 19 Mo. 613; *State to use of Clifford v. Beldsmeier*, 56 Mo. 226; *State to use of Hayden v. McHale*, 16 Mo. App. 478; *State to use of Russell v. Fargo*, 151 Mo. 280, 52 S. W. 199; and *State ex rel. Shipman v. Allen*, 144 Mo. App. 1. c. 243, 128 S. W. 809.] In other words, it is held that any fees or damages or expenses incurred in defending an attachment suit prior to the dissolution of the attachment are recoverable in a suit on the attachment bond. This case is distinguishable from those cases wherein the defendant in an attachment suit gives bond and has the property released prior to the adjudication, as well as those where the attachment is dissolved and after that the defendant incurs expense to defend the action on the merits.

In an attachment suit the defendant may defeat the attachment in two ways, one by a plea in abatement, the other by a judgment on the merits. In this case, the court dismissed the plea in abatement because of the answer to the suit on the merits. It required, therefore, the judgment on the merits in the slander suit to dissolve the attachment as it was in force and undissolved until that judgment was rendered.

The condition of the bond was that plaintiff would prosecute her action "with effect." This means *with success*. [*Campbell v. Harrington*, 93 Mo. App. 1. c. 324, 325.]

While the attachment statutes have since the creation of the State undergone some changes, none of the decisions have been permitted to stand by the higher courts which held that where an attachment is dissolved by a judgment on the merits for the defendants he will not be permitted to recover such items as are included in the verdict in this case from the signers of the bond.

Finding no error in the record, the judgment is affirmed. *Robertson, P. J.*, and *Sturgis, J.*, concur.

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FRANCES A. TANNER, Respondent, v. ST. LOUIS,  
IRON MOUNTAIN & SOUTHERN RAILWAY  
COMPANY, Appellant.

Springfield Court of Appeals, December 31, 1914.

1. **RAILROADS: Death from Crossing Collision: Damages.** Action against a railroad company by a widow for damages on account of the death of her husband resulting from injuries received from being struck by defendant's train at street crossing. Evidence reviewed.
2. ———: **Crossing Collisions: Death from Injuries: Presumptions.** In an action against a railroad company for damages for the death of plaintiff's husband as a result of being struck by defendant's train at a railroad crossing, absent any evidence to the contrary, it will be presumed that the deceased in crossing over the railroad was exercising proper care and that he looked and listened where it was his duty to do so.
3. ———: ———: ———: **Demurrer to Evidence.** In an action for damages against a railroad company for the death of her husband, killed while crossing a railroad track at a street crossing, *held* that under the evidence a demurrer to the testimony was not warranted.
4. **PLEADING AND PROOF: Variance: How Taken Advantage of.** A variance between the petition and evidence which is received without objection can only be taken advantage of by defendant by an affidavit of surprise as contemplated by Sec. 1846, R. S. 1909, if defendant was not prepared to meet the issue.

## Tanner v. Railroad.

5. **EVIDENCE: Objections: What Not Sufficient.** An objection to the evidence introduced because "it is irrelevant and immaterial to the case," is too general.
6. ———: **Death at Railroad Crossing: Collisions: What Evidence Relevant.** Action for damages because of the death of the plaintiff's husband resulting from a collision with defendant's train at a crossing. Evidence of the age and condition of the health of the deceased may be admissible as an aid to the jury in considering the alleged contributory negligence of deceased.

Appeal from Scott County Circuit Court.—*Hon. Frank Kelly, Judge.*

**AFFIRMED.**

*Anthony & Davis* for appellant.

(1) The trial court should have held under the evidence that even though those in charge of appellants' train were guilty of some negligence as set out in plaintiff's petition, yet that Samuel Tanner, deceased, was guilty of such contributory negligence as to bar any right of recovery on the part of respondent. *Laun v. Railroad*, 216 Mo. 563; *Stotler v. Railroad*, 204 Mo. 619; *Kelsay v. Railroad*, 129 Mo. 362; *Hook v. Railroad*, 162 Mo. 569; *Huggart v. Railroad*, 134 Mo. 673; *Kreis v. Railroad*, 148 Mo. 321; *Railroad v. Railroad*, 154 Mo. App. 156; *Sanguinette v. Railroad*, 196 Mo. 466; 3 *Elliott on Railroads*, sec. 1165; *Burnett v. Railroad*, 172 Mo. App. 51; *Green v. Railroad*, 192 Mo. 131; *Farris v. Railroad*, 167 Mo. App. 392; *Burge v. Railroad*, 244 Mo. 76; *Burnham v. Railroad*, 175 Mo. App. 286; *Reeves v. Railroad*, 251 Mo. 169; *Keele v. Railroad*, 167 S. W. 433; *Underwood v. Railroad*, 168 S. W. 803; *Maginnis v. Railroad*, 165 S. W. 849. (2) While there is a general allegation of negligence in plaintiff's petition, yet that allegation being followed by specific assignments of negligence, the plaintiff must recover, if at all, upon some of the acts specifically set out. *Clark v. Motor Car Company*, 177 Mo. App. 623.



*Ralph E. Bailey & James A. Finch* for respondent.

(1) It is overwhelmingly established that train number 10 which caused the death at the time of this accident was flagrantly violating ordinance of the city of Poplar Bluff concerning the speed of trains and appellant was therefore guilty of negligence *per se*. Karle v. Railroad, 55 Mo. 476; Mahr v. Railroad, 64 Mo. 267; Bergman v. Railroad, 88 Mo. 678; Keim v. Railroad, 90 Mo. 314. (2) Under our rulings the burden of showing negligence on the part of the plaintiff is upon the defendant. The presumption is that plaintiff performed his duty until the contrary is made to appear. Stepp v. Railroad, 85 Mo. 229; Petty v. Railroad, 88 Mo. 306; Schlereth v. Railroad, 96 Mo. 509. The petition sets out sufficient allegations, both general and specific, to justify recovery under the testimony setting forth acts of negligence both general and specific.

ROBERTSON, P. J.—This is an action by the widow of Samuel Tanner to recover damages for his death resulting from injuries which he received at a street crossing in Poplar Bluff in October, 1912. The jury returned a verdict for \$3500 upon which judgment was entered and defendant has appealed. The passenger train which caused Tanner's death was north-bound and about thirty minutes late. Deceased, seventy-two years of age, about 3:30 in the morning, was driving a team hitched to his wagon on the road leading to this crossing from the south and just before passing onto defendant's track the wagon road leads to the west. He came from the south and was passing over the crossing to the west. There were four sets of railroad tracks at this crossing east of the track upon which defendant's train was running, the latter being by us designated as track five, the vertex in a rather sharp curve to the west of which is a short

distance south of the crossing. At the extreme east of the crossing the distance to track five was about fifty feet. Leading off to the south and east from these tracks were numerous switch tracks and on one of them up near the track upon which the train was running at the time of the accident, there was a string of box freight cars extending up near the crossing. The depot is about eleven hundred feet north of the crossing. The city of Poplar Bluff had an ordinance prohibiting trains from running within its limits at a greater speed than eight miles an hour. There were other tracks west of five and beyond them there was an electric street arc light. To his right and north of the crossing a distance of over 700 feet there was standing, with its headlight towards the crossing, an engine. At about the time that deceased was passing onto the railroad tracks he was seen to look in both directions. There was no testimony that he stopped. No signal was given by the approaching train, as shown by substantial testimony. Several witnesses testified that it was running between twenty and twenty-five miles an hour. According to all of the testimony the train approached this crossing at a greater rate of speed than eight miles an hour, except the engineer who testified that he was running between six and ten miles an hour; the fireman put it at between eight and twelve miles an hour. The engineer in charge of the train testified that he saw the team, heard it walking on the board crossing "making lots of noise" and that it started in a trot across said track five. He says at that time his engine was about thirty feet from the crossing. He says he saw the driver raise up in the wagon and either jerk or slap the team which "took a dart across the track." The pilot of the engine struck the team throwing one of them east and the other on the west of track five and hurled the deceased from the wagon. The train was stopped in about one hundred and fifty feet after it struck the team. The

only testimony on the amount of noise that was being made by the train was to the effect that it was very little. The engine was equipped with a very strong electric head light. The morning was clear and still and the deceased's sight and hearing were good. He had frequently gone over this crossing before. The plaintiff's petition charges that by reason of defendant's conduct therein alleged that "she is entitled to receive as a penalty from said defendant for the death of her said husband a sum not less than \$2000 and not to exceed \$10,000." During the progress of the trial deceased's son was placed upon the witness stand and was asked the age of his father at the time of his death, to which the defendant objected as "not material in this case." The witness was then asked the condition of his father's health before the accident, to which the defendant objected "because it is irrelevant and immaterial in this case." Both objections were overruled, the defendant excepted and the witness proceeded without further objections to testify to facts tending to prove the earning capacity of the deceased and the dependance of the plaintiff thereon for support. The witness was cross-examined by defendant on these points. The defendant requested and was refused the following instruction:

"You are instructed that plaintiff has failed to allege any facts in the petition authorizing the recovery of compensatory damages therefore, if your verdict should be for plaintiff it must not exceed the sum of two thousand dollars."

The contention here is that the court should declare as a matter of law that the deceased was guilty of such contributory negligence as to bar any right of recovery on the part of the plaintiff and that the defendant's instruction, above quoted, should have been given. We have decided that both of these contentions should be ruled against the defendant.

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Tanner v. Railroad.

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The defendant says that plaintiff should not be permitted to recover because if he had listened he could have heard the train before getting into danger and if he had looked he could, to say at least, have seen the headlight reflections at the west end of the crossing.

In the absence of evidence to the contrary the presumption must prevail in this case that deceased in passing over this crossing was exercising proper care; that he looked and listened where it was his duty to do these things, or either of them. [Weller v. Chicago, Milwaukee & St. Paul R. Co., 164 Mo. 180, 198, 64 S. W. 141; Riska v. Union Depot R. Co., 180 Mo. 168, 188, 79 S. W. 445; Powers v. St. Louis Transit Co., 202 Mo. 280, 100 S. W. 655 and Weigman v. St. Louis, Iron Mountain & Southern Railway, 223 Mo. 699, 718, 123 S. W. 38.]

There is no evidence in this case that justifies a holding by us that the general presumption was so completely overcome as to authorize a demurrer to the testimony. One witness testified that deceased looked both directions when, or soon after, going on the first track. His view of the approaching train was obstructed by the box cars; the street light subdued to a debatable extent the light from the train, which owing to the convexity of the track was not cast parallel with it, except, possibly, when the engine was within a very short distance of the crossing. The train was making very little noise, in fact the engineer's testimony, as above noticed, discloses by his ability to "hear lots of noise" caused by the team walking on the boards, that the train was not likely making sufficient noise for deceased to have heard it or located the track it was on had he listened. This feature of the case brings it directly in line with the *Weigman* case, supra, wherein the only variation is that there the party could not likely hear the approach-

ing train on account of the noise of another engine than the one attached to the colliding train.

Respondent suggests that the duty of deceased to look and listen existed only before he entered upon the east track and that he, it not having been shown that he knew upon what track through trains ran, should not be required to stop and listen between each track, but it is not necessary for us to discuss that question as there is no conclusive proof that he did not discharge the duty to look and listen, or one of these if either would have been effective, if such duty developed upon him along the full length of the crossing.

The defendant is in no position to complain of the refusal of the trial court to give an instruction requested by it and quoted above, for the reason that the issue at which it was aimed was brought into the case by testimony that went to the jury without objection and, therefore, constituted nothing more than a variance which should have been taken advantage of by an affidavit of surprise as contemplated by section 1846, Revised Statutes 1909, if defendant considered that it was not prepared to meet the issue. [Thornton v. American Zinc, Lead & Smelting Co., 178 Mo. App. 38, 42, *et seq.*, 163 S. W. 293.]

The objections made by the defendant, hereinbefore noticed, amount to nothing. They are too general, are mere epithets and indicate no reason for their interposition. [State ex rel. West v. Diemer, 255 Mo. 336, 350.] Besides, we cannot say that the knowledge of the age or condition of the health of the deceased would not have been of some aid to the jury in considering his alleged contributory negligence, and therefore, could not be condemned as wholly irrelevant and immaterial for all purposes.

The judgment is affirmed.

*Farrington, J.*, concurs and files separate opinion.  
*Sturgis, J.*, concurs in result and files separate opinion.

## CONCURRING OPINION.

FARRINGTON, J.—I concur in the opinion of ROBERTSON, P. J., but desire to express my views with reference to the question raised by appellant concerning the admissibility of testimony going to the compensatory feature of the verdict.

The petition is based on the statute, section 5425, Revised Statutes 1909. The Supreme Court held in the last Boyd case (*Boyd v. Railway Co.*, 249 Mo. 110, 155 S. W. 13) as I construe the opinion therein (see *Harshaw v. Railroad*, 173 Mo. App. 1. c. 478-485, 159 S. W. 1. c. 6-9, and *Johnson v. Springfield Traction Co.*, 178 Mo. App. 445, 163 S. W. 893), that the damages recoverable under this statute are both penal and compensatory. If that is true, I take it that a petition based on that statute would call for both penal and compensatory damages and that under such a pleading testimony would be admissible concerning pecuniary loss. The instruction asked by the plaintiff as to the measure of damages follows the one given in the Boyd case. The defendant asked no instruction on the measure of damages except the one set out in the main opinion and that instruction shows on its face that it is based on the ground that the petition did not authorize a recovery of compensatory damages. In view of the fact that the instruction which was given for the plaintiff permitted the jury to allow two thousand dollars as penalty and fifteen hundred dollars as compensatory damages, and in view of the further fact that no instruction was asked by the defendant limiting the penalty to two thousand dollars, I think the verdict falls clearly within the law as declared in the opinion in the last Boyd case allowing two thousand dollars

as penalty and any additional amount as compensatory damages. There is evidence in the record of a wrongful killing which would support the verdict to the extent of two thousand dollars and also evidence of pecuniary loss which would support it for any amount over two thousand dollars and not exceeding ten thousand dollars. I concur in the affirmance of the judgment.

### CONCURRING OPINION.

STURGIS, J.—I concur fully on the question of contributory negligence being one for the jury. On the question of damages, the petition, the evidence admitted and the instructions given are in accord with my views of the proper construction of section 5425, Revised Statutes 1909, and are not in conflict with the last Boyd case, 249 Mo. 110, 155 S. W. 13), and no question of waiver by failing to make proper objections to the evidence or failure to ask an instruction to separately estimate the penal and compensatory damages is necessary to a proper decision of this case. Those interested may read my reasons in my concurring opinion filed in the Harshaw case, 173 Mo. App. 468, 159 S. W. 3, and in my dissenting opinion in the Johnson case, 178 Mo. App. 457, 163 S. W. 899.

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STATE OF MISSOURI, ex rel., COUNTY COLLECTOR, Respondent, v. R. B. OLIVER, Appellant.

Springfield Court of Appeals, December 31, 1914.

1. **REVENUE LAWS: Term Includes What.** The term "Revenue Law" includes and covers all the laws relating to the disbursement of the revenue and its preservation as well as provisions relating to the assessment, levy and collection thereof.

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State ex rel. v. Oliver.

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2. ———: Action Involving: Jurisdiction of Appeal in Supreme Court. An action to collect taxes for the payment of a drainage ditch, assessed by the county court under sections 5578, 5635, R. S. 1909, involves the construction of the revenue laws of the State of which the Supreme Court alone has jurisdiction on appeal. (Constitution, Art. 6, sec. 12.)

Appeal from New Madrid County Circuit Court.—  
*Hon. Frank Kelly*, Judge.

TRANSFERRED TO SUPREME COURT.

*Oliver & Oliver* for appellants.

*James R. Brewer* and *Henry C. Riley, Jr.* for respondent.

ROBERTSON, P. J.—This is an action to collect taxes alleged to have been levied and assessed by the county court of New Madrid county, for the purpose of paying bonds issued and sold to obtain funds for the construction of a drainage ditch, under article IV, chapter 122, Revised Statutes 1899, now, as amended, article IV, chapter 4 (section 5578-5635), Revised Statutes 1909. The defendant answered and the issues thus made call for a construction of the laws which, if they are revenue laws, deprives us of jurisdiction by reason of section 12, article VI, of the Constitution of this State. Under this act the drainage district is organized under the supervision of the county court and that court levies the assessment, and the collection and distribution of the tax thus derived takes the same course, under section 5599, “as State, county and school taxes upon real estate, and when collected the said tax shall be by the collector paid over to the court treasurer monthly.” In the case of *State, ex rel. v. Adkins*, 221 Mo. 112, 116, 119 S. W. 1901, it is said that the “‘Revenue laws of this State’ may well include stat-



utes concerning the disbursement of the revenue as well as the gathering of it into the county or State chest." Again at page 118, it is said "that the term 'Revenue law' covers and includes laws relating to the disbursement of the revenue and its preservation as well as provisions relating to the assessment, levy and collection of it." *Lamar Township v. City of Lamar*, 169 S. W. 12, recently decided by the Supreme Court, in a case wherein the plaintiff township sued to recover money wrongfully paid over by the township officers to the city treasurers and in that case the Supreme Court entertained jurisdiction because a construction of the revenue law was involved.

By said section 5599 certain preliminary costs incident to these drainage districts are paid out of the county treasury, provision being made for refunding the same to the county and section 5602 (Sec. 8301, R. S. 1899) provides for the county court issuing and selling bonds to pay construction and improvement expenses and creating and collecting, "in the same manner as taxes are collected," a sinking fund to meet the payment of said bonds. We think that since these districts are organized and controlled by the county court and their finances in charge of that body that when that portion of the law relative to taxation is drawn in question by a tax suit that a revenue law is involved. In the case of *State, ex rel. Applegate v. Taylor*, 224 Mo. 393, 469, 123 S. W. 892, it is said, in discussing a drainage district's relation to the county, that "it owes its bearing to and is subject to its authority and control in the same sense in which townships of the county are subject to its control. It does not even have the independent government like township organization. The county court administers its entire affairs, and the county keeps its records." Then follows a further discussion, on pages 470 and 471, of the relation of drainage districts to the county.

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Woodin v. Leach.

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Concluding that we have no jurisdiction this case is transferred to the Supreme Court.

*Sturgis and Farrington, JJ., concur.*

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J. F. WOODIN, Respondent, v. W. A. LEACH,  
Appellant.

Springfield Court of Appeals, December 31, 1914.

1. **EVIDENCE: Principal and Agent: Agent's Declarations Prior to Proof of Agency: Inadmissible.** Declarations made by an alleged agent before there is any testimony tending to prove that relation are inadmissible.
2. **SALES: Fraud: Not Established, When.** Fraud is not established by merely proving that certain timber of the value of \$250 was sold for \$800.
3. **FRAUD AND MISREPRESENTATION: Principal and Agent: Ratification.** Evidence examined and considered not sufficient to show that the owner of certain timber accepted the benefit of the sale of same after knowledge of the fraud of a third person who misrepresented its value, such party not having been proven to be the agent of the owner so as to bind him by the fraud.
4. **PLEADINGS: Failure of Consideration: Issue to be Tendered by Answer.** Where the issue of failure of consideration is not tendered by the answer, such failure cannot be shown. (Sec. 1974, R. S. 1909.)

Appeal from Butler County Circuit Court.—*Hon. J. P. Foard, Judge.*

**AFFIRMED.**

*H. H. Freer and David W. Hill* for appellant.

(1) If one who assumes to do an act which will be for the benefit of another, commits a fraud in so doing, and the person to whose benefit the fraud will enure seeks, after knowledge of the fraud, to avail

himself of that act, and to retain the benefit of it, he must be held to adopt the whole act, fraud and all. *Zehnder v. Stark*, 248 Mo. 55; *Atlantic Mills v. Indian Orchard Mills*, 147 Mass. 275. (2) By accepting the benefits of the transaction and retaining same after service of the counterclaim, and after adequate opportunity to repudiate the transaction, he ratified the acts of Noland, his agent, in making the deal and such ratification is just the same as previous authority. 31 Cyc. 1258-1259-1260-1261-1263-1267-1271; *Kirpatrick v. Pease*, 202 Mo. 471. (3) The declarations of Noland were admissible after defendant had established a prima-facie case of agency. *Peck v. Ritchey*, 66 Mo. 114.

*F. G. Taylor* and *E. R. Lentz* for respondent.

(1) In the absence of an express appointment, ratification or estoppel there is no evidence of agency. *Alexander v. Rollins*, 14 Mo. App. 109; Same case affirmed, 84 Mo. 567. (2) One's agency cannot be shown by his declarations or admissions. *Mitchim v. Dunlap*, 98 Mo. 418; *Timber and Iron Co. v. Cooperage Co.*, 112 Mo. 383; *Bank v. Leyser*, 116 Mo. 51; *Bank v. Morris*, 125 Mo. 343; *Gronewey, etc. Co. v. Estes*, 144 Mo. App. 418, 128 S. W. 789; *Mitchell v. Samford*, 149 Mo. App. 72, 130 S. W. 101; *Handlan v. Miller*, 143 Mo. App. 101, 122 S. W. 754; *Griswald v. Haas*, 145 Mo. App. 578, 122 S. W. 783; *Jolly v. Huebler*, 132 Mo. App. 675; *Oil Co. v. Zinc Co.*, 98 Mo. App. 324; *Hackett v. Van Frank*, 105 Mo. App. 384; *State ex rel. v. Henderson*, 86 Mo. App. 482; *Christian v. Smith*, 85 Mo. App. 117; *Murphy v. Insurance Co.*, 83 Mo. App. 481; *Chothers v. Adcock*, 43 Mo. App. 318; *Iron Co. v. Halverson*, 48 Mo. App. 383. (3) Where a party relies on a ratification by the principal of the acts of the agent he must tender such issue in his pleadings. *Liscomb v. Talbott*, 243 Mo. 1, 147 S. W. 805; *Loving*

v. Cattle Company, 176 Mo. 353; Noble v. Blount, 77 Mo. 244; Wade v. Hardy, 75 Mo. 399; McClannahan v. Payne, 86 Mo. App. 292. In this case there is neither pleading nor proof of any ratification, by the plaintiff of the acts or representations alleged to have been made.

ROBERTSON, P. J.—Under date of June 16, 1911, plaintiff and defendant entered into a written contract wherein defendant agreed to pay the plaintiff eight hundred dollars for "all of the white oak, red oak, ash and hickory timber" on one and a half sections of land in Phillips county, Arkansas, except the timber inside of fields and fenced portions of said land. Three hundred dollars of the purchase price was to be paid when the agreement was signed and the balance as the defendant removed the timber, and it was stated that all of said balance was to be paid within ninety days, from the date of the contract. Further along in the contract it was stated that defendant should have twelve months in which to remove the timber from the land, but no point is made on that here. The contract was signed, the defendant paid three hundred dollars and on August 6, 1911, he paid two hundred dollars more. This action is brought to recover the balance of the purchase price. The trial resulted in a directed verdict for the plaintiff for three hundred dollars, with interest, and the defendant has appealed. The defendant filed his unverified answer to plaintiff's petition alleging that he was induced to enter into the contract by false and fraudulent representations made to him by plaintiff's agent as to the amount and character of the timber and prayed judgment against the plaintiff for the cancellation of said contract and judgment for two hundred and fifty dollars on account of the alleged fraud.

The plaintiff was at the time the contract was entered into a resident of said county in Arkansas,

and the defendant was engaged in business in Poplar Bluff, this State, under the name of the Leach Lumber Co. Plaintiff testified that for some time prior to the date of the contract he was frequently approached by one Noland, then living near the land on which the timber was located, who proposed to purchase it; that he (plaintiff) finally agreed to sell the timber to Noland on the terms stated in the contract and that the contract was made out in Noland's name and at Noland's request was sent to the Leach Lumber Co. at Poplar Bluff and that it was returned to the plaintiff with Noland's name scratched out and signed in the name of Leach Lumber Co. by W. A. Leach, president. The timber was removed by the defendant. Shortly after defendant signed the contract he had the timber examined by his inspector, who testified at the trial that it was not worth to exceed two hundred and fifty dollars. The defendant testified that Noland proposed several times to sell him this timber and that all he (defendant) knew about it before signing the contract he learned from Noland and bases his counterclaim on the alleged false and fraudulent representations made to him by Noland as plaintiff's agent. Plaintiff testified that he paid Noland no commission nor otherwise compensated him for making the sale. The defendant testified that Noland did not represent him, was not his agent, was not on his payroll and that he was not employed by him.

The defendant in his efforts to establish an agency between Noland and plaintiff sought to do so principally by statements made by Noland. This the court refused to permit him to do and properly so because all declarations made by an alleged agent before there is any testimony tending to prove the relation are inadmissible for that purpose.

The defendant now practically concedes that the only theory upon which he can maintain his counterclaim is that since the alleged fraud of Noland has

come to the knowledge of the plaintiff he is seeking to acquire the benefits thereof and that, therefore, he must be held to have ratified and adopted the whole of Noland's conduct, citing *Zehnder v. Stark*, 248 Mo. 39, 55, 154 S. W. 92. The defendant contends that even if the plaintiff did not know of the alleged fraud which Noland had perpetrated until defendant's answer was filed that then it became his duty to renounce the contract and repudiate Noland's conduct. It is also said that plaintiff must have known that he was defrauding some one since he sold timber of the value of only two hundred and fifty dollars for eight hundred dollars, but the value of the timber is a matter to a great extent of opinion and without more than a mere honest difference of opinion thereon is not a proof of fraud.

There was no testimony introduced or offered that suggests even that Noland made any representation to defendant as to the value of the timber. Defendant testified that "He told me there was twenty large trees of twenty-four inches of veneer timber." But there is no testimony or offer to show that this was not true. A witness, defendant's timber inspector, was asked about this but owing to objections sustained by the court he did not answer and defendant made an offer to prove by him that there were *no white oak* trees on the land that would make veneer, which leaves an entire absence of proof that Noland's alleged representations of which defendant testified were false. There appears in the record a statement of another witness to the effect that there was *no veneer white oak* on the land, but this does not prove that there was no veneer timber.

A feature of the case that would justify plaintiff in believing that defendant's charge of fraud was feigned is that after the contract was signed, three hundred dollars paid thereon, the defendant, in sixty days thereafter and after the timber had been examined by his inspector and after he had no doubt removed a

considerable portion, or all, of it, paid the plaintiff two hundred dollars more which must have been based on defendant's idea that under the contract he had removed five hundred dollars' worth of timber, which he alleged in his answer was worth only two hundred and fifty dollars.

Noland must have been the agent of either the plaintiff or defendant; the defendant failed wholly to introduce or offer any testimony that tended to prove that Noland was the agent of plaintiff. It would be a strange and unjust rule that would permit the plaintiff to be burdened with the alleged fraud of Noland simply because defendant was charging Noland with fraud and of being plaintiff's agent when plaintiff had good reason to believe, on account of defendant's conduct, if nothing more, that no fraud had been perpetrated. It will also be observed that the contract does not specify any particular kind or character of timber but undertakes to sell only whatever may be on the land.

In referring to the payment made by defendant after the time when he should have discovered the alleged fraud we have not overlooked the cases holding that this does not estop him from pursuing his remedy for alleged fraud. [Campbell v. Hoff, 129 Mo. 317, 325, 31 S. W. 603, and cases cited.] However, in a quotation from Page on Contracts in the case of Brown v. South Joplin Lead & Zinc Mining Co., 231 Mo. 166, 173, 132 S. W. 693, it is said that by making partial payments on the purchase money with full knowledge of the facts makes the contract valid, but we pursue that question no further as such an issue was not in controversy in that case and is not necessarily in controversy here, except we are referring to defendant's conduct to show that the plaintiff should not be held to be acting in bad faith and accepting the benefits of any fraud Noland may have been guilty of simply because he did not, on discovering the charges

in defendant's answer, voluntarily submit and yield unto the defendant all that he claimed, when defendant had paid more, than he claimed in his answer that he owed and did this after he had discovered the alleged discrepancy in the price and the value of the timber he had bought.

Defendant submits to us that by reason of section 1974, Revised Statutes 1909, the jury should not have been directed to return a verdict, because his testimony, and offer of testimony, tended to prove a failure of consideration, citing several authorities in support of the contention. There was no such issue tendered by his answer. The proof was made and tendered to prove fraud. In all of the cases cited under this point it is shown that the question of consideration was raised by the pleadings, except in *Murphy v. Gray*, 37 Mo. 536, and there the brief of respondent shows that it was so put into the case. This point is without merit.

The judgment is affirmed.

*Sturgis and Farrington, JJ., concur.*

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C. A. ROBERTSON, Respondent, v. WESTERN  
UNION TELEGRAPH COMPANY, Appellant.

Springfield Court of Appeals, December 31, 1914.

1. **EVIDENCE: Invited Error.** Defendant will not be heard to complain of the admission of evidence which is erroneous, where he himself has invited the injection thereof into the case.
2. **TELEGRAPHS AND TELEPHONES: Neglect in Transmitting Messages: Statutory Provisions Concerning.** Legislation imposing a penalty on telegraph and telephone companies for neglect to promptly transmit messages traced through different statutory provisions and revisions. (R. S. 1865, pp. 349, 350; R. S. 1879, sections 883, 885; R. S. 1889, secs. 2725, 1827; R. S.



1899, secs. 1255, 1257; Laws 1907, pp. 188, 189; R. S. 1909, secs. 3330, 3332.)

3. ———: **Delay in Transmitting Messages: Defenses.** A telegraph company, sued under the provisions of sec. 3330, R. S. 1909, for delay in transmitting a message, may defend under sec. 3332, R. S. 1909, because its wires were out of order; but to avail itself of such defense it must also show that plaintiff was notified of said fact as required by Sec. 3332, R. S. 1909. (FARRINGTON, J., Dissenting.)

Appeal from Dunklin County Circuit Court.—*Hon. W. S. C. Walker*, Judge.

**AFFIRMED.**

*Geo. H. Fearons, Wammack & Welborn* for appellant.

(1) Section 3330, Revised Statutes 1909, is penal in its nature and must be strictly construed and applies only to such cases as come clearly within its provisions. *Connell v. Tel. Co.*, 108 Mo. 459; *Cowan v. Tel. Co.*, 149 Mo. App. 407. (2) A party is entitled to recovery only upon the cause of actions stated in his petition. *Sedalia Gas Light Co. v. Mercer*, 48 Mo. App. 644; *Jacquin v. Grand Ave. Cable Co.*, 57 Mo. App. 331; *Gurley v. Railroad*, 93 Mo. 445; *Hunter v. Railroad*, 147 Mo. App. 28; *Milliken v. Commission Co.*, 202 Mo. 637.

*E. R. Lentz* for respondent.

Sections 3330, 3331 and 3332 are all *in pari materia* and relate to the same subject-matter and must all be read and construed together. The defendant offered evidence under this section of the statute to show that the line of the defendant's company were not in working order at the time that the message was delivered. It also asked an instruction upon that question, thus bringing into the case by its own action, the provisions

of section 3332. And having introduced evidence and requested and obtained an instruction under that section, the defendant is certainly in no position to object to an instruction given on behalf of the plaintiff upon the same subject-matter. R. S. 1899, secs. 3330, 3331, and 3332; *Smith v. The Telegraph Company*, 57 Mo. App. 259; *Pollard v. Telegraph Company*, 114 Mo. App. 533.

ROBERTSON, P. J.—Plaintiff obtained a judgment in the circuit court and defendant has appealed. The action originated in Butler county and was taken on a change of venue to Dunklin county. The petition, so far as is necessary to note here, alleges that plaintiff about two o'clock on October 24, 1912, delivered to the agent of the defendant at its office at Puxico, this State, a message to be transmitted and delivered to John Mann care of Riverview Hotel, Cape Girardeau and that he paid the agent the fee for transmitting and delivering the message; that defendant carelessly and negligently failed to transmit and deliver the said message promptly, in good faith and with impartialty to said John Mann or to said hotel until about eight o'clock p. m. of that day. The prayer of the petition is for the recovery of the penalty provided for in section 3330, Revised Statutes 1909. The answer is a general denial. That the plaintiff delivered the telegram and paid the charges as alleged is not contradicted. It is also admitted in defendant's brief that the message did not get to Cape Girardeau until 6:15 p. m. of the 24th and that it was not sent from Puxico until five minutes after six o'clock. Plaintiff with a number of other school teachers was traveling between Poplar Bluff and Cape Girardeau, their destination, on a special train. The train stopped a very short time at Puxico and at that point the plaintiff hurried off the train and went to the depot delivered the message, paid the charges, inquiring of the agent, as he

testifies, if he could "get it through right at once," to which the agent replied that he could and then plaintiff hurried back to the train which proceeded on its way. The telegram was to inform a party at the hotel the number of teachers on the train who would want accommodations there, arrangements having previously been made to hold rooms for this advice until four o'clock on the afternoon of that day. The testimony of the agent of the defendant at Puxico was that when the train was pulling in he started to go out and plaintiff met and handed the message inquiring what it would cost, to which the agent replied telling him the amount, which the plaintiff paid, and as plaintiff started to leave the agent told him that they had no wire, and that what he meant was that the wire was broken in two "and we couldn't work it until late that evening." When the agent went to work that morning he knew this line was out of order. He says that about six o'clock he sent the message by the way of Springfield. Why he did not send it earlier is not clear. It took only ten minutes to get it through that way. If there were wire troubles that way it is not shown when they existed or what they were. A line repairer of the defendant at Cape Girardeau testified that about half past eight o'clock on the morning of the 24th he received a notice of trouble between Puxico and Brownwood, that he left that afternoon at about two thirty on the first train and "found two poles blown down and the wire was laying across a barbed wire fence on the ground. It was six o'clock in the afternoon when I got the wires cleared up." This does not necessarily disclose that these conditions caused the trouble which the agent claimed prevented him from sending the message.

The plaintiff objected to the testimony as to the wire not being in working order for the alleged reason that it is an affirmative defense and could not be proved under a general denial. The objection was overruled.

The plaintiff's testimony to the effect that the agent did not tell him that the line was not in order was introduced only after the agent testified that he did tell him. The defendant treated this alleged compliance with the requirements of section 3332 as a defense to plaintiff's case. It got into the case, not only without objection on defendant's part, but as a direct result of its efforts in that behalf, and plaintiff had a right to meet that issue. If it was error to inject it into the case defendant invited it and cannot now be heard to complain. The only error alleged here is that of giving the following instruction in behalf of plaintiff, after an instruction had been given for plaintiff on the facts applicable to section 3330:

"The court instructs the jury that if the wires and lines of the defendant company were out of repair at the time the message in question was delivered to its manager at Puxico, it was then the duty of the said manager to plainly inform the plaintiff of that fact at the time the message was received by him, and if you believe and find that the said manager did not so plainly inform plaintiff of that fact then plaintiff is entitled to recover in this case notwithstanding the fact that the said wires were not in working order. And upon this proposition the burden is on the defendant to show that plaintiff was so informed."

The only theory on which defendant submits the case here is disclosed by its brief, after referring to this instruction, as follows: "We submit to the court, that this instruction simply entitled the plaintiff to recover upon one cause of action and under one section of the statute when his petition was founded upon another cause of action and another section of the statute." The brief then discloses that it is considered that the petition declares on section 3330 and the instructions allows a recovery under section 3332.

Assuming, for the purpose of this contention, that defendant had not waived its right to complain of this

instruction and to plaintiff's instruction above quoted we find that the first legislation on the subjects therein covered was in 1855 (Revised Statutes 1856, section 5, p. 1521). Other duties not necessary to notice were imposed by other sections at the inception of the legislation. As a matter of history it is interesting to read the opinion in Wann v. Western Union Telegraph Co., 37 Mo. 472, and the one in Reed v. the same company, 135 Mo. 661, 668 and 667, 37 S. W. 904. In the General Statutes of 1865, pp. 349 and 350, sections 9 and 11, we find these two sections as carried down to the present through the various revisions (Revised Statutes 1879, sections 883 and 885; Revised Statutes 1889, sections 2725 and 1827, and Revised Statutes 1899, sections 1255 and 1257), except that in 1907 (Laws 1907, pp. 188 and 189) what is now section 3330 was amended so as to make the penalty cover failure to *deliver* the message as well as failure to *transmit* it, and the amount of the penalty had been increased. The clear intent and purpose of this law, which prescribes but one penalty in the first section thereof, is to secure to the patrons of telegraph lines fair, prompt and impartial service. An action for a failure to comply with any of the provisions of these section has for its purpose, and its only purpose, the recovery of the penalty prescribed in section 3330. There is but one penalty prescribed, and under the facts in this case, whether plaintiff's or defendant's theory is correct, but one penalty can be recovered. If the theory of the defendant is correct a party who delivers a message to it without notice of any conditions preventing its prompt transmission must, before he sues for the penalty, ascertain if the defendant's line was in working order at the time; a thing that is peculiarly within the knowledge of the defendant and impossible of ascertainment in many instances, and in this one, by the plaintiff where no notice was given. If conditions exist at the time when the message is delivered to the company of which

it is not aware, then under some circumstances, it has been held that it is not liable under either of these sections. [Taylor v. Western Union Telegraph Co., 181 Mo. App. 288, 168 S.W. 895, 898.] When a telegraph company is sued for violating the provisions of section 3330 it can show, in defense, if so alleged in its answer, or if not and unobjected to by plaintiff, that its wires were out of order and that it so notified plaintiff as in section 3332 required, if it knew that fact. It cannot hide behind that section if it did not comply therewith. If the wire trouble is the cause of the delay then, under such a defense, the only question is that of notice by the defendant at the time the message was delivered to it. While these sections are highly penal and must be strictly construed they must have a reasonable interpretation and one that will not wholly defeat their object. If when a company is sued it can defeat an action under section 3330 by offering proof of a violation of section 3332 then plaintiff must, before he sues, do the likely impossible thing of ascertaining the cause of the delay. If when the message was tendered the conditions were such that the defendant could not promptly transmit it and the plaintiff was not notified of this fact, though the agent knew of the conditions, it may be argued with some plausibility that the defendant did not deliver the message "promptly, and with impartiality and good faith" as required by section 3330.

For the reasons urged here we hold that the trial court committed no error in giving this instruction, but we are not quoting it as a model, as we have not considered it otherwise than as above discussed and presented to us by appellant.

The judgment is affirmed.

*Sturgis, J.*, concurs. *Farrington, J.*, dissents for the reason that the petition seeks recovery solely on section 3330, Revised Statutes 1909, and the court gave an instruction authorizing a recovery under section

3332, Revised Statutes 1909. There being not one syllable in the pleadings which would justify a recovery under the last-mentioned section, the instruction of the court is to this extent broader than the pleadings, which is held to be reversible error in the case of *Degonia v. Railroad*, 224 Mo. l. c. 589, 123 S. W. 807. In his opinion the judgment should be reversed and the cause remanded.

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MRS. O. C. COOK, Respondent, v. JAMES W. LUSK,  
W. C. NIXON, and W. B. BIDDLE, Receivers of  
the ST. LOUIS and SAN FRANCISCO RAIL-  
ROAD COMPANY, Appellants.

Springfield Court of Appeals, December 31, 1914.

1. **CARRIERS OF PASSENGERS: Mistreatment by Conductor: Statement.** Action by a lady for damages because of alleged mistreatment by defendant's conductor. Evidence examined and considered sufficient to sustain a finding for plaintiff.
2. **———: Action Against by Passenger for Mistreatment: Punitive Damages.** A lady passenger, rightfully on a train of defendant, who had given the conductor her ticket and was afterwards forced to pay cash fare by the conductor who used insulting language to her and threatened to put her off the train, was entitled to recover not only actual but punitive damages as well.
3. **INSTRUCTIONS: Carriers: Mistreatment of Passenger by Conductor: Evidence: Harmless Error.** An instruction in an action against a railroad by a lady passenger for damages because of mistreatment by the conductor, required a finding that plaintiff was frightened. There was sufficient evidence of humiliation and mental anguish and even if it was not fully established that plaintiff was frightened, defendants were not prejudiced thereby.
4. **APPELLATE PRACTICE: Instructions: Failure to Limit Punitive Damages: Not Error, When.** Where a verdict was for a less amount than that claimed in the petition, no reversible error was committed because an instruction for plain-

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tiff did not limit the amount of punitive damages to the amount claimed in the petition.

5. **DAMAGES: Carriers: Mistreatment of Passenger: Damages Not Excessive, When.** Action by a woman passenger for damages because of mistreatment and insults at the hands of the defendant's conductor. The evidence showed great humiliation suffered in the presence of an acquaintance and several other passengers; that plaintiff was so unnerved that she was sick for a week. An award of \$250 actual and \$500 punitive damages was not excessive.

Appeal from Pemiscot County Circuit Court.—*Hon. Frank Kelly*, Judge.

**AFFIRMED.**

*W. F. Evans, Moses Whybark and A. P. Stewart* for appellants.

(1) Instruction number 1 given for plaintiff is erroneous because it allows a recovery for humiliation and fright, when there was no competent evidence from which the jury could conclude that plaintiff was humiliated, and no evidence whatever that she was frightened by the alleged conduct of the conductor. It is error to submit to the jury issues which have no evidence to support them. *Mansur v. Botts*, 80 Mo. 658; *Degonia v. Railroad*, 224 Mo. 589; *Grönweg, etc. Co. v. Estes*, 114 Mo. App. 427; *Smith v. Bank*, 147 Mo. App. 463. (2) Instruction number 2 given for plaintiff on the measure of damages is erroneous because it allows the jury, in assessing actual damages, to take into consideration the humiliation suffered by plaintiff, when there was no evidence that she was humiliated. Authorities cited under point 1. Said instruction is further erroneous in not limiting the assessment of punitive damages to the amount claimed in the petition. *Spohn v. Railroad*, 116 Mo. 633. (3) The verdict of the jury is excessive in respect of ac-



tual damages. The most that plaintiff was entitled to recover, under the evidence, was nominal damages. The verdict is grossly excessive in respect of punitive damages. *Trigg v. Railroad*, 74 Mo. 147; *Smith v. Railroad*, 127 Mo. App. 53; *Boling v. Railroad*, 189 Mo. 238; *Breen v. Transit Co.*, 102 Mo. App. 479.

*Ward & Collins* for respondent.

(1) Instruction number 1 given for plaintiff was proper. If the abuse, insult and conduct of the conductor as alleged, were proven, then plaintiff would be entitled to recover if she was humiliated and caused to suffer mental anguish and humiliation, regardless of whether she was frightened or not. *Bolles v. Railroad*, 134 Mo. App. 696; *Glover v. Railroad*, 129 Mo. App. 563; *White v. Railroad*, 132 Mo. 339; *Leyser v. Railroad*, 138 Mo. App. 45; *Bowling v. Railroad*, 189 Mo. 219; *Trigg v. Railroad*, 74 Mo. 152; *Smith v. Railroad*, 127 Mo. App. 59; *Cathey v. Railroad*, 149 Mo. App. 143; *Harkless v. Railroad*, 151 Mo. App. 463. (2) Instruction number 2 for plaintiff was correct. Aside from the direct testimony that plaintiff was humiliated the jury would have the right from the facts and circumstances to say whether or not she was humiliated. And as the amount alleged in the petition for punitive damage was for \$1000, and the amount of the verdict of the jury was \$500, the defendant could not possibly be hurt by failure to limit the amount of recovery to the amount expressed in the petition, for failure of an instruction to limit plaintiff's recovery to the amount sued for is without prejudice, where the verdict was less than the petition demanded. *Williamson v. Railroad*, 133 Mo. App. 375; *Samson v. Railroad*, 156 Mo. App. 419; *Edgar v. Kupper*, 110 Mo. App. 280; *Grant v. Railroad*, 25 Mo. App. 227; *Murphey v. Railroad*, 96 Mo. App. 272. (3) Plaintiff was entitled to recover actual damage not only for the extra dollar fare she

paid, but also for her insult, suffering and humiliation, and if the jury found actual damages for the plaintiff and that the defendant's conductor acted wilfully, wantonly and maliciously, they could also award her punitive or exemplary damage which they might believe under the facts and circumstances would be just and serve as an example to prevent a repetition of such conduct and a punishment to defendant. *Glover v. Railroad*, 129 Mo. App. 571; *Smith v. Railroad*, 122 Mo. App. 88; *White v. Railroad*, 132 Mo. App. 345; *Wilson v. Railroad*, 160 Mo. App. 659; *Harlers v. Electric Co.*, 123 Mo. App. 28; *Smith v. Railroad*, 127 Mo. App. 60; *Voss v. Bolzenius*, 147 Mo. App. 380; *Bowles v. Railroad*, 134 Mo. App. 750; *Boling v. Railroad*, 189 Mo. 238; *Hickory v. Welsh*, 91 Mo. App. 4.

FARRINGTON, J.—The plaintiff, a woman, recovered a judgment against the defendants for \$750, of which \$250 was allowed as actual and \$500 as punitive damages. Her petition counted on mistreatment of her by the conductor in charge of one of defendants' trains while she was a passenger thereon. The defendants are the admitted receivers for the St. Louis and San Francisco Railroad Company.

Plaintiff testified that she is a married woman, residing at Holland, in Pemiscot county, Missouri, and that she purchased a ticket from the defendants' agent at that place entitling her to first-class passage to Lilbourn, Mo., paying him eighty-four cents. She had with her a baby and a suit case. She boarded one of defendants' trains and took a seat beside Mrs. S. E. Redman, a woman who lived in Arkansas and who was known to the plaintiff. She testified that soon after the train left Holland, going north, a conductor came along, raised the window by the seat where she sat, took up her ticket, and went on; that after the train had passed the next station the conductor again demanded her ticket; that she informed him he had al-

ready taken it up; that he told her she had not given him any ticket and that he did not have a ticket for Lilbourn at all; that he came back to her two or three times; that when she told him she had given him her ticket he was angry, gruff, independent, and spoke harshly, and told her at three different times she was a liar, and that once he told her she had "emphatically lied;" that he demanded that she pay her fare and told her if she did not he would put her off the train; that he denied that she boarded the train at Holland, saying she had boarded it at Blytheville, a station south of Holland; that to avoid being put off the train she finally gave him a five dollar note and that he gave back only four dollars. He gave her a receipt which she introduced in evidence, showing that he had marked the cash fare paid as eighty-four cents. She is corroborated by the defendants' agent at Holland in that she bought a ticket of him to Lilbourn, paying eighty-four cents for it; and she is corroborated in practically every detail as to what she says occurred on the train by Mrs. Redman, the woman with whom she sat, excepting her statement that the conductor called her a liar. Mrs. Redman testified that she was not paying particular attention to the conversation all the time and she would not say that the conductor did not call Mrs. Cook a liar. Her testimony on this point is as follows: "He was closer to Mrs. Cook than he was to me. He was standing in front of us some way. He might have been in the seat in front of me. Q. You say he didn't call her a liar? A. He talked awful gruff to her. Q. Well, did he call her a liar? A. Well, he said the same thing; I don't— Court: Tell what he said. The best that I remember, he didn't say—I didn't hear him say 'You are a liar,' but he used the same meaning, it meant the same thing. Q. Well, what did he say? A. I might not say it like he said it. Q. You say he didn't call her a liar, what did he say? A. When I heard him—they talked a good while; I never

paid no mind. Q. What did you hear him call her? A. I don't remember. Q. You didn't hear him call her anything, did you? A. He talked awful rough. Q. Rough and independent? A. He talked a long time to Mrs. Cook that I didn't pay any mind to at all. Q. He was angry, was he? A. Yes, sir."

Plaintiff testified that owing to the gruff manner in which the conductor talked to her, calling her a liar three times, making her pay the second fare, and threatening to put her off the train, greatly excited and unnerved her and that on account thereof she was too weak to carry her grip when she reached her destination and that she remained nervous for a week—did not go to bed but felt bad and was sick.

The conductor as a witness for the defendants testified that plaintiff never gave him a ticket at all, and denied that he was abusive or insulting in any way or that he threatened to put her off the train. Defendants also called as witnesses a Mrs. Gomer, wife of one of the railroad employees, and her sister, Mrs. Walker. They were several seats away from the plaintiff on the car and testified that they heard no such conversation between plaintiff and the conductor as detailed by plaintiff and Mrs. Redman. Another witness for the defendants (Mrs. Green) who was on the car heard nothing of the trouble. The testimony of these three ladies introduced as defendants' witnesses can have but little weight as they are shown to have paid but slight attention to what was transpiring between the conductor and plaintiff; their testimony is merely negative in character. [See *Quinley v. Springfield Traction Co.*, 180 Mo. App. 287, 165 S. W. 346, 349.]

There being nothing unreasonable in the statement of plaintiff and her witnesses as to what occurred we are required to treat the finding of the jury thereon as binding.

The case made by plaintiff's evidence is that she was rightfully on the train and entitled to passage from Holland to Lilbourn and that the conductor wrongfully made her pay cash fare and in doing so wantonly, wilfully and maliciously used insulting language toward and concerning her in the presence of one person she knew as well as the strangers on the car. This entitled her to recover not only actual damages but punitive damages as well, because his conduct was such as to heap insult upon injury. [See, *Bolles v. Railroad*, 134 Mo. App. 1. c. 705, 706, 115 S. W. 459; *Glover v. Railroad*, 129 Mo. App. 1. c. 571-574, 108 S. W. 105; *Cathey v. Railroad*, 149 Mo. App. 134, 130 S. W. 130; *White v. Street Railway Co.*, 132 Mo. App. 339, 112 S. W. 278; *Leyser v. Railroad*, 138 Mo. App. 34, 35, 119 S. W. 1068; and *Harkless v. Railroad*, 151 Mo. App. 463, 132 S. W. 29.] Plaintiff testified that the conductor was a large man, and that he called her a liar, threatened to put her off the train, and made her pay the second time. We differ with appellant and hold that this is sufficient conduct when used toward a woman who was in no way in the wrong to bring on humiliation.

Complaint is made that instruction numbered 1 given for plaintiff allowed a recovery for fright when there was no evidence that the plaintiff was frightened. The instruction required the jury to find that plaintiff "was caused to and did suffer humiliation, became abashed, unnerved and frightened, and was caused to and did suffer mental anguish, humiliation and nervousness and was damaged thereby." There was sufficient evidence in our judgment to support a finding that plaintiff was frightened, when the conduct of the conductor toward the unattended woman with her baby is taken into consideration. Still, there was sufficient evidence of humiliation and mental anguish, and the finding that plaintiff was frightened could not materially affect the defendants—as the in-

struction probably placed a greater burden on the plaintiff than was necessary for her to carry in order to recover. [See, *Brashear v. Patriots*, 161 Mo. App. l. c. 573, 144 S. W. 163; *Oehmen v. Portmann and Woempner*, 153 Mo. App. 240, 133 S. W. 104; and *Berry v. Railroad*, 214 Mo. 593, 114 S. W. 27.]

Error is assigned in that the second instruction for plaintiff did not limit the amount of punitive damages to the amount claimed in the petition. The verdict was for a less amount than that claimed in the petition; hence, no reversible error on this score. [*Williamson v. Railroad*, 133 Mo. App. 375, 113 S. W. 239; *Sampson v. Railroad*, 156 Mo. App. 419, 138 S. W. 98.]

What has been said disposes of the assignment of error as to the refusal of defendants' instruction numbered 2.

It is contended that the verdict is excessive. The \$250 allowed by the jury as actual damages was for the humiliation suffered by the plaintiff in the presence of an acquaintance and a number of strangers. The evidence is that she was so unnerved that she was sick for a week. The verdict is not so excessive as to call for our interference. The smart money allowed is not out of proportion in amount with allowances approved as will be seen by reading the cases hereinbefore cited in which punitive damages were allowed passengers.

There is no reversible error in the admission of testimony.

The judgment is affirmed. *Robertson, P. J.*, and *Sturgis, J.*, concur.

W. F. HARPER, Respondent, v. ST. LOUIS AND  
SAN FRANCISCO RAILROAD COMPANY, Ap-  
pellant.

Springfield Court of Appeals, December 31, 1914.

1. **APPEAL AND ERROR: Assault by Railroad Brakeman: Re-  
view of Evidence: Bias and Prejudice.** Action because of  
injuries received by reason of an alleged assault on plaintiff by  
a brakeman and a news agent on defendant's train. Evidence  
examined and summarized. The verdict of the jury is con-  
sidered so much against the weight of the evidence as mani-  
festly to be the result of prejudice and bias.
2. ———: **Verdict Against Weight of Evidence: Bias and  
Prejudice: Reversal.** Where from the overwhelming weight of  
the evidence it can only be concluded that passion and prejudice  
controlled the jury and where the amount allowed shows passion  
and prejudice, the appellate court should reverse the judgment  
and remand the case for a new trial instead of reducing the  
verdict.

Appeal from Pemiscot County Circuit Court.—*Hon.*  
*Frank Kelly*, Judge.

**REVERSED AND REMANDED.**

*W. F. Evans, Moses Whybark* and *A. P. Steward*  
for appellants.

*Ward & Collins* for respondent.

FARRINGTON, J.—A judgment was rendered in  
the circuit court of Pemiscot county for the sum of  
two thousand dollars in plaintiff's favor. His cause  
of action was based upon an alleged assault made  
upon him by the defendant's brakeman, and the said  
brakeman knowingly permitting a news agent on the  
train to assault plaintiff. From the record we gather  
that there had been a former trial of this case which  
for some reason not appearing did not result in a

final determination. When this trial was had, resulting in the judgment appealed from, a verdict for five thousand dollars actual damages was returned which ten of the jurors signed. While a motion for a new trial was pending, in which complaint was made that the verdict was excessive and the result of bias and prejudice, the trial judge required plaintiff to enter a remittitur of three thousand dollars of the verdict, which he did, and judgment was then rendered for two thousand dollars and the motion for new trial overruled.

The defendant (appellant) assigns a number of errors which we have examined and find that none would justify a reversal excepting the one we will discuss in this opinion, namely: "Because the verdict of the jury is so much against the evidence as manifestly to be the result of bias or prejudice.

We think the record sustains appellant's contention; and realizing that it is only in extraordinary and extreme cases where appellate courts grant new trials on the ground that the judgment is against the weight of the evidence when the trial court has refused to do so, but entered a remittitur instead, we have, after much consideration, concluded that the interests of justice require that this case be retried. The trial judge found that the verdict was so excessive as to demand that it be reduced. In such cases it is to some extent discretionary whether the verdict be reduced by remittitur or a new trial be granted; and that discretion is subject to review by this court. In some cases, the demands of justice may be met by a remittitur; in others, only by a new trial.

Plaintiff testified that at the time of the trial he resided at Blytheville, was fifty-four years old, a member of the church, and did not get drunk; that in August, 1912, he was running a hotel at Luxora, Ark., and that in his business he sold soda pop at five cents a

Plaintiff's  
Account of  
His Case.



bottle; that on Sunday morning, August 11, 1912, he boarded one of defendant's northbound trains, having purchased a ticket to Caruthersville, Mo., and took a seat in the smoking car beside a man whom he did not know and has not since seen and began talking to him; that during the journey he bought two bottles of soda pop from a news agent, paying ten cents a bottle, and drank one and gave the other to the man beside him, and when they had finished he took both bottles and threw them out of the car window; that this occurred at a point some three or four miles below Caruthersville. He testified that when the news agent charged him ten cents a bottle for the pop, he remarked, "This is more than I am in the habit of paying," and that the news agent replied, "It is none of your damn business how much we sell soda for;" that when he threw the bottles out the window, the news agent said, "You son-of-a-bitch, I'll learn you how to throw my bottles away," and began fighting him and broke a glass bottle over his head, and that while this was going on the defendant's brakeman came up and grabbed plaintiff by the right arm, pulled it back over the seat, and said, "Put in on the son-of-a-bitch, he needs it." Plaintiff testified that he was struck several times with the glass bottle while his arm was being held back by the brakeman; that the result was some scalp wounds, which bled profusely, and a few minutes of unconsciousness; that as a result of the brakeman pulling his arm around back of the seat it has been in such shape since that he could not use it; that he cannot lift anything or use his arm to amount to anything and that it pains him all the time, and that he has to carry it with his hand or thumb resting in his shirt bosom like a sling. He testified that he lost two-months' time when he could do nothing and that his time was worth fifty dollars per month; that since that time he has been canvassing and selling fruit trees, but that his arm pains him and he cannot write with his

right hand; that before the assault he was right-handed and that his right arm was larger than his left, but that since then and for several months prior to this trial the right arm has been one-half inch smaller than his left and he had a doctor measure his arms. The trouble occurred on August 11, 1912. This trial was had on July 30, 1913. The injuries to his head soon healed and he claimed no damages for permanent injuries except as to his arm. He testified that when he reached Caruthersville he was cut about the head and was bleeding and that he went to Mr. Butler's barber shop and had him wash and clean him up and that the barber then put a bandage on his head; that he then went out on the street and met Lee Hooper, an acquaintance of five years, who conducted a saloon; that he told Hooper of the trouble and complained of his arm hurting and that Hooper took him to the office of Doctor Phipps who gave him an "antiseptic" that put him to sleep, and that the doctor put his arm back in place and bandaged it. On cross-examination he was asked: "Did he put a bandage on or simply put your arm in a sling?" He answered: "He put a bandage on." Plaintiff testified that the doctor charged him twenty-two dollars, and that he had also expended some fifteen dollars for liniments, ointments and the like. He testified that that same afternoon he telephoned and had a lawyer come down town where he met him (in the lawyer's office). Plaintiff admitted that he had used a hoe a little in his garden, but only with his left hand, and that he had used his left hand in setting out some trees. He could not remember whether there was more than one news agent on the train. He was asked if he tried to buy any more soda pop after they beat him up, and he replied, "I believe I did; I am not sure." "Q. From the same fellow? A. Well, it might have been." He testified that the fight was with the same news agent that sold him the two bottles at ten cents each; that he knew but

one man on the train who saw the fight, a Mr. Mayhon who lived at Blytheville, plaintiff's home at the time of the trial; this man was not a witness in the trial. Plaintiff testified that from the time he boarded the train until he alighted at Caruthersville he did not leave his seat with the possible exception that he may have gone to get a drink of water once.

C. E. Butler, the barber, testified that he washed plaintiff's head and saw one or two cut places in his scalp and found a small piece of glass, but that *he did not* put a bandage on plaintiff's head; that plaintiff held his arm down at his side; that he did not know whether plaintiff was "grunting" from his arm or his head. He testified: "*Wasn't complaining of his arm in particular. Could not say what his condition was as to being drunk or sober; he was 'grunting' and 'taking on' so much.*"

Lee Hooper testified that he met plaintiff on the street after the latter came out of the barber shop and that he complained of injuries to his shoulder and that the witness took him to Doctor Phipps' office; that plaintiff was holding his right hand down by his side; that he (the witness) saw the doctor examine the arm and give plaintiff a hypodermic, and saw the doctor prepare to bandage the arm, but left the office before this was done. He testified that plaintiff was not intoxicated but that he did not know whether or not plaintiff had been drinking.

Doctor Phipps testified for plaintiff that the injured man came to his office and that he treated the cuts in the scalp and put a bandage on plaintiff's head, and went into detail about the treatment to the head. *He did not recall* that plaintiff complained of his arm or that he treated or bandaged the arm or that he gave plaintiff a hypodermic injection; *nor did he recall that anything was wrong with plaintiff's arm*, and thinks he would remember if he bandaged the arm. He thought from plaintiff's action *that he had been drink-*

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*ing some.* He testified that he might have charged plaintiff two dollars, but that *he did not charge him anything like twenty-two dollars; that he made no charge on his books* as plaintiff paid him cash at the time, and that he has no account against plaintiff for any amount.

In rebuttal, J. F. Sanders testified that since the last of January or the first of February before the trial in July, plaintiff had resided next door to him and that he had heard plaintiff complain of his arm and had seen plaintiff carry his right hand in his bosom or his watch pocket; that he saw plaintiff set out some trees for Mr. Collins, but that he only held on with his left hand while some one else filled in around them. Quoting from his testimony: "I am swearing I never saw him set out any trees himself or dig the holes himself. So far as I know he may have done that."

Plaintiff's uncle, J. H. Harper, saw plaintiff frequently after the trouble in August. He travels and makes his headquarters at Nashville, Tenn. He testified that his nephew has not been able to use his right arm—that "he had not seen him use it." He had seen plaintiff carry the arm in a sling or in his shirt. He testified that plaintiff had been taking some orders for him but had done no manual labor.

Doctor Conrad testified that he had examined plaintiff's arm in February before the trial in July, and that he thought it measured *one-eighth* of an inch smaller than the left arm, but he could not tell whether plaintiff was left-handed or not. He testified that the day after plaintiff was injured he saw plaintiff's arm in a *sling* and that plaintiff *told* him it was *bandaged*. He does not say that he saw a bandage on plaintiff's shoulder. He testified that plaintiff wanted him to take the bandage off but that he did not do so. He said he testified in a former trial of this case and that he did not think the injury was necessarily a perma-

nent one and that he thought possibly there would be an improvement; that he had never examined plaintiff's arm but once which was in February, some six months prior to the trial; that when he did examine it, the shoulder had the appearance of being struck, crushed or mashed at some previous time.

It will be seen that the evidence of plaintiff's witnesses bears the stamp of negative rather than positive testimony.

Plaintiff in rebuttal denied some of the evidence introduced by the defendant, but did not explain why he went to Doctor Conrad the day after the injury instead of going back to Doctor Phipps who had treated and bandaged his arm, as he says, the day before.

We have emphasized some of the things concerning which plaintiff's own witnesses contradict him.

C. M. McCleary testified that he was acting as a helper to O. A. Owens the news agent with whom plaintiff had a fight; that when he (McCleary) sold plaintiff the soda pop plaintiff was in the chair car; that when he went back to get the bottles plaintiff informed him that he had bought them and had a right to throw them away; that "when plaintiff raised up, he saw that plaintiff was going to make trouble," and that he left and went into the smoking car, telling plaintiff he would give him the bottles, but that plaintiff got up and followed into the smoking car where he called the witness "several sons-of-bitches" and "a God damn liar;" that plaintiff followed him up and down the aisle and called him these vile names several times, but that he did not strike the plaintiff; that he was in the smoking car when plaintiff called Owens, the head news agent, vile names; that Owens thereupon hit him with a bottle and struck him in the face and on the head a number of times; that while this was going on, Pat Kelleher, the brakeman, came up, pulled Owens off the plaintiff and pushed him away, but did not hit the plaintiff or

**Defendant's  
Evidence.**

take hold of his arm in any way and pull it around the seat, or say to Owens to "put it on him;" that Kelleher did nothing but separate them and stop the trouble. He testified that plaintiff was intoxicated while on this train.

Owens corroborates McCleary as to what took place in the smoking car. He testified that he heard plaintiff cursing McCleary; that plaintiff called him (Owens) "a God damn thief;" that when plaintiff did so the witness began fighting, striking plaintiff over the head with a glass candy horn which broke; that Kelleher did nothing but come up and pull him off the plaintiff and push him away; that Kelleher did not at that time touch the plaintiff or twist his arm around the seat. He testified that plaintiff had been going up and down the aisle cursing; that plaintiff was drunk and that he could smell whiskey on his breath; that he would curse McCleary every time he came in the smoking car.

Kelleher testified that he was the brakeman on the train and was seated in the back of the car in which the trouble occurred; that when he saw it he came up, pulled off Owens, and did not at any time strike or touch plaintiff except to put his hand on plaintiff's breast to push him into his seat when he started to get up and follow Owens after he (Kelleher) had separated them; and that he separated them as soon as he could after the fight begun. He testified that plaintiff appeared to be intoxicated and was cursing and swearing at the news boys.

The conductor saw none of the trouble. He did testify that he saw the plaintiff walking up and down the aisles and that he had the appearance of having been drinking.

Defendant then introduced some witnesses whose testimony we will next summarize who were mere spectators, some of whom were neighbors of the plaintiff. No attempt was made to show that they bear any ill-

will toward the plaintiff or are in any way interested in the outcome of this lawsuit. Some of them do admit that they were paid their expenses and three dollars a day for their time in coming to court as witnesses for the defendant.

John Johnson testified that he resides at Blytheville and knows plaintiff; that he was seated in the smoking car of the train in question and that plaintiff while in there acted like a man that was drinking; that he heard plaintiff cursing the news agents; that there were two news agents on the train; that he saw plaintiff come into the smoking car following the news agent and heard him make remarks about the train crew stealing and call the news agent vile names; that he saw the brakeman separate them and that the brakeman took no part whatever in the fight; that when plaintiff started to raise up after the fight the brakeman did push him back in his seat; that plaintiff lives about a block from him in Blytheville; that he has observed plaintiff and that plaintiff did not carry his arm in a sling or in his bosom until the witness saw him at the other term of court, when plaintiff claimed he was "crippled up;" that he has seen plaintiff setting out shade trees and digging the holes with both hands at Doctor London's home and that this was between July at the time of the trial and February or March preceding.

C. Litton, who lives at Marked Tree, Ark., saw plaintiff board the northbound train at Luxora, August 11, 1912. He testified that plaintiff was drinking at the time and that "he had been drinking all morning and pretty well all night before;" that he knows plaintiff as a man that gets drunk.

C. E. Hurley testified that he lives at Blytheville; that he knew plaintiff from February 9, 1913, to June 20, 1913; that he lived close to plaintiff but never saw him carry his arm in a sling and that he saw plaintiff every day; that the first time he saw plaintiff carrying

his arm that way was on the day of the trial; that he had seen plaintiff hoeing and planting beans in his garden and using both hands; that he talked to plaintiff over the garden fence where he was twenty or thirty feet from plaintiff and saw him using both hands in hoeing.

Alf Mason who lives at Caruthersville saw plaintiff in April or May, 1913, setting out trees and testified that plaintiff was digging holes with a spade and using both hands.

Robert Lee Fisher testified that he was on the train in the smoking car and saw plaintiff; that plaintiff had the appearance of being a drunk man; that he heard plaintiff cursing the news agents, calling them "sons-of-bitches," before he got into the fight; that he saw the fight and saw the brakeman separate them, pushing the news agent away and making plaintiff sit down; that the brakeman did not grab plaintiff by the arm and pull it over the seat; that he was only three or four seats away from the plaintiff; that he was right there looking on at the fight and he testified that the brakeman did not touch plaintiff's arm.

Jeff Collier's deposition was introduced. He also saw the fight in the smoking car. He stated that plaintiff acted like he was intoxicated and that his conduct was very bad; that he was cursing and swearing and calling the news agents vile names; that he saw the trouble and that the brakeman did not pull plaintiff's arm around back of the seat.

This was the case put to the jury—the evidence on which they returned a verdict for five thousand dollars actual damages against this defendant.

The vital issue was whether or not the brakeman joined in the fight to injure plaintiff and pulled plaintiff's arm around the seat as described by the plaintiff, or was in good faith trying to stop the fight as it was his duty to do. It will be noted upon reading the



foregoing summary of the evidence that on this point the plaintiff's testimony stands alone against that of the witnesses for the defendant, some of whom may be termed "interested," but some of whom are shown to have no interest in the case nor any ill-will toward the plaintiff. Plaintiff is not corroborated by his neighbors, the witnesses who had observed him since the fight with reference to the use of his arm. In no material respect is his description of his conduct on the train and of what took place corroborated in a single instance or circumstance. He differs with his witness, the barber, as to what the barber did, and he differs with his witness, Doctor Phipps, as to what the doctor did in his only treatment of plaintiff. We therefore have the plaintiff's testimony, which, standing alone, makes a case which should be submitted to the jury, but one which is uncorroborated in practically every particular and denied by all the eyewitnesses and those with whom he came in contact, not only as to what took place on the train but as to what occurred shortly afterward and on down to the day of the trial. It is indeed strange that plaintiff should go practically a whole year lacking only a few days, during all of which time his arm was paining him, useless, benumbed, crippled, and getting worse, without once consulting a physician for advice or treatment. According to his own testimony, the only time, after the day of the injury, that he consulted a physician was when he went to have his arm measured. As to this, plaintiff says the doctor found the difference in size in his two arms to be one-half inch, whereas the doctor says he found a difference of about one-eighth of an inch. Immediately after he was injured he procured the services of a physician, but from that day henceforth to the good day of judgment he never again sought the services of a doctor to attend his alleged injuries.

It is impossible to understand how a fair and impartial body of men could arrive at the result this jury

reached under the evidence had they followed the instructions of the court; and we can conceive of their action and attribute the reason therefor to nothing short of passion and prejudice.

Although it is true that the decisions in this State hold that an excessive verdict is not necessarily the result of passion and prejudice, it is an evidence of passion and prejudice. We have a verdict returned by this jury which the trial judge refused to let stand, having required the plaintiff to remit three thousand dollars of it before the motion for new trial was overruled. This, to our minds, is some evidence that as to *amount* the trial court found they had acted with passion and prejudice. When a case is presented to a jury and the overwhelming weight of the evidence is against the finding of the jury and where the verdict itself bespeaks passion and prejudice, nothing short of a reversal of the judgment and a remanding of the case can meet the ends of justice.

It is true that in the case of Cook v. Globe Printing Co., 227 Mo. 471, 127 S. W. 332, the Supreme Court required a remittitur of an enormous sum of money and still upheld the verdict; but upon reading that opinion it will be seen that in the beginning of the discussion of this question the court said there was no error in the instructions, no error in admitting evidence and no misconduct shown on the part of the jury, and, continuing—“*that the publication, which is a basis of the action, was libelous, we think there can be no doubt whatever.*” (Italics are ours.) In that case, the court on viewing the evidence which was before it found that plaintiff had a cause of action on the merits, and, since it concluded therefrom that plaintiff was entitled to recover, could not attribute passion and prejudice to the jury in finding the very thing that the court itself would have found. There was left in that case only the question as to the *amount* to be given.

Our attention has not been called to a single case in which the court would say that the overwhelming weight of the evidence is against the plaintiff's contention on the merits, where it said a remittitur was proper; because, in such a case, where there is evidence of passion and prejudice on the part of the jury, to-wit, in the amount of the verdict, the court cannot say that the same passion and prejudice did not contaminate the finding of *liability*.

The law entitles litigants to a fair trial before an impartial jury; and where an appellate court comes to the conclusion that either the plaintiff or the defendant has not been accorded his rights in this respect, it is not only their privilege but their sworn duty to see that justice is sustained, and if necessary it must grant a new trial, even though the trial court failed in its duty so to do. A remittitur in such a case does not meet the requirements of fair dealing and justice. If the defendant in this case is not liable, then as great an injustice is perpetrated on it should the verdict be for one dollar in amount. The result of injustice may be *lessened* by the smaller verdict, but justice is not subject to either long or short division; the decimal point should be after the word and not between the letters. There is a long line of decisions in this State holding that where a proper administration of the law to the end that justice be done requires that a new trial be had, an appellate court will see that it is granted. [See, Spohn v. Railway Co., 87 Mo. 74; Baker v. Stonebraker's Admrs., 36 Mo. 345; Price v. Evans, 49 Mo. 396; Lehnick v. Street Ry. Co., 118 Mo. App. 611, 94 S. W. 996; Chitty v. Railway Co., 148 Mo. 64, 49 S. W. 868.] The closing lines of the opinion in the case of Garrett v. Greenwell, 92 Mo. l. c. 125, 4 S. W. 441, are as follows: "Looking at all these things, it is a matter of profound surprise that the jury, with all this evidence before them, could have found as they did. But, inasmuch as they have done so, our duty, under

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Harper v. Railroad.

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the rule announced in the case of *Whitsett v. Ransom*, 79 Mo. 258, and *Spohn v. Railroad*, 87 Mo. 74, is clear, and so the judgment is reversed and the cause remanded. All concur." Again this language was used in the case of *State v. Primm*, 98 Mo. l. c. 372, 373, 11 S. W. 732: "This must be true if any reliance is to be placed upon human testimony, and there was no attempt made to impeach the witnesses who contradicted the prosecutrix on so many important particulars as aforesaid. The result obtained by the verdict must therefore be ascribed to prejudice, passion or partiality and not to that calm weighing of the facts in evidence which should always characterize the deliberations of a jury. On such occasions this court does not hesitate to interfere as is attested by our decisions (citing cases). This is the rule uniformly announced in civil cases, and in those which are criminal, we have never abdicated the right we possess to overturn verdicts which are not based upon the corner stone of substantial justice. [*State v. Packwood*, 26 Mo. 340; *State v. Burgdorf*, 53 Mo. 65; *State v. Mansfield*, 41 Mo. 470; *State v. Daubert*, 42 Mo. 238; *State v. Brosius*, 39 Mo. 534; *State v. Jaeger*, 66 Mo. 173; *State v. Castor*, 93 Mo. 242.]" The reason of the rule is well stated in *Elliott's work on Appellate Procedure*, section 21, as follows: "It is inconceivable that a high court of justice, such as an appellate tribunal, may not, upon an investigation of the record, so frame its judgment as to prevent the defeat of justice by technical and arbitrary rules. The denial of this right involves the affirmation that the highest courts cannot award justice, and this conclusion cannot be vindicated, since the underlying and sovereign principle is that the right of appeal insures to litigants who have obeyed the substantive rules of law and conformed to the rules of procedure a judgment awarding them justice under the laws of the land. It must be true, therefore, that a high appellate tribunal may deliver and enforce a judg-

ment that will prevent wrong and award justice to the parties entitled to it." [See, also, *Caruth v. Richeson*, 96 Mo. l. c. 192, 9 S. W. 633, and *Spiro v. Transit Co.*, 102 Mo. App. 250, 76 S. W. 684.] A case similar on its facts to the one before us is that of *Germann v. Great Northern Ry. Co. (Minn.)*, 130 N. W. 1021, where the court held that the remittitur ordered by the trial judge would not suffice in such a case and that the trial court should have gone a step further and ordered a new trial.

We feel that as plaintiff's testimony on the vital question of whether or not the brakeman did what plaintiff says he did is unsupported by any eyewitness, and that as on other material questions in the case his testimony is disputed by not only the defendant's disinterested, unimpeached witnesses, but by his own witnesses as well, the verdict of the jury in plaintiff's favor was the result of passion and prejudice against the defendant, and that justice demands that a fair and impartial jury try the issues. The judgment must accordingly be reversed and the cause remanded for a new trial. *Robertson, P. J.*, and *Sturgis, J.*, concur.

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**J. E. WISECUP, Respondent, v. THE AMERICAN INSURANCE COMPANY OF NEWARK, NEW JERSEY, Appellant.**

Springfield Court of Appeals, December 12, 1914.

1. **INSURANCE: No Insurable Interest: Contract Void.** Contracts of insurance are void unless the insured has some insurable interest in the subject-matter.
2. **INSURANCE: Waiver: Cannot Render Valid a Void Contract.** An insurance company cannot be held to a contract of insurance on the principle of waiver, where the company could not make such a contract in the first instance.

## Wisecup v. Insurance Co.

3. **MARRIED WOMAN: Marital Rights of Husband in Property: Statutory Provisions.** The statutes of Missouri have gone very far toward depriving the husband of marital rights in his wife's property. [Secs. 8308, 8309, R. S. 1909.]
4. **INSURANCE: Husband and Wife: Property of Wife: Insurable Interest of Husband.** A husband has no insurable interest in the real property of the wife which he has conveyed to her through a third person, though by reason of the marital relation he collects the rents and uses the money. Such property is her separate property under the statute. [Secs. 8308, 8309, R. S. 1909.]

Appeal from Greene County Circuit Court.—*Hon. Guy D. Kirby*, Judge.

REVERSED.

*Paul M. O'Day* and *John Schmook* for appellant.

(1) The petition should allege an insurable interest in the assured at the time he obtained the policy and at the time of the loss. The failure to do so is fatal. *Harness v. The National Fire Ins. Co.*, 62 Mo. App. 245; *Scott v. Phoenix Ins. Co.*, 65 Mo. App. 75; *Clevinger v. Northwestern Ins. Co.*, 71 Mo. App. 73. Hence the demurrer of defendant, its objection to any evidence, and its motion in arrest, should have been sustained. (2) The law requires that the assured must have an interest in the property insured, otherwise policies of insurance would partake of the nature of gambling or wager contracts. *Marness v. National Ins. Co.*, 62 Mo. App. 247; *Moving Picture Co. v. Insurance Co. (Pa. Sup. Ct.)*, 90 Atl. 642; *Agricultural Ins. Co. v. Montague*, 38 Mich. 548. (3) Under the Married Woman's Act the plaintiff (husband) had no insurable interest in the property which was owned by his wife. 19 Cyc. 589; 22 N. E. 428, 120 Ind. 554; *Traders Insurance Co. v. Newman*, 122 N. W. 703; 85 Neb. 85; *Bassett v. Farmers, etc., Ins. Co.*, 17 Atl. 363, 81 Maine, 373; *Clark v. Dwelling House Ins. Co.*, 133 Pac. 1182 (Oregon); *Oatman v. Bankers, etc., Fire*

Assn., 72 S. W. 725, 21 Ark. 292; Planters Ins. Co. v. Loyd, 46 S. E. 706, 55 W. Va. 63; Tyree v. Virginia Fire & M. Ins. Co., 53 S. W. 442, 2 Ind. Ter. 625. (4) The deed from plaintiff (husband) to his wife, raised the presumption of gift, and the house and lot and rents became her separate property. 39 Cyc. page 136, note 22; Gilliland v. Gilliland, 96 Mo. 522; Planing Mill Co. v. Christophel, 60 App. 106; Ilgenfritz v. Ilgenfritz, 116 Mo. 429; Woodward v. Woodward, 148 Mo. 241.

*Neville & Gorman* for respondent.

(1) The petition alleges an insurable interest both at the time the policy was issued and the time of the fire. A party having any interest in property has an insurable interest, such as (1) Husband as tenant by the courtesy though the wife be only a joint tenant. (2) Husband, if he lives with his wife and shares with her the use of her own own separate personal and real property. May on Insurance, sec. 81, page 88; Travis v. The Continental Ins. Co., 32 Mo. App. 205; Travis v. The Continental Ins. Co., 47 Mo. App. 482. (2) The plaintiff in the case at bar was the sole and absolute owner of the property destroyed by fire, but whatever his interest might have been in the property, there is evidence to show that defendant's agent knew the status thereof, and waived it by writing the policy in plaintiff's name. Travis v. The Continental Ins. Co., 47 Mo. App. 482; Wood on Fire Insurance, 529, 530. (3) The defendant knew the plaintiff had not the record title, but waived that provision in the policy. Barnard v. Nat. Fire Ins. Co., 38 Mo. App. 106; Franklin v. Atlantic Fire Ins. Co., 42 Mo. 456; 2 Wood on Fire Ins., 894; Scarrett Estate v. Casualty Co., 166 Mo. App. 570; Nute v. Ins. Co., 109 Mo. App. 596.

STURGIS, J.—This is a suit on a policy of insurance on a dwelling house in Webb City, Missouri,

wherein it is provided that same shall be void in case the insured is not the sole and unconditional owner of the same in fee both at law and in equity. The property insured burned during the life of the policy. The petition admits and the evidence shows that the legal title was in plaintiff's wife both at the time the policy was issued and when the property was destroyed by fire. The plaintiff had at one time owned the property, but several years before this policy was issued he had deliberately and advisedly conveyed the same by ordinary deed to a third party and that party in turn conveyed same to his wife for the purpose of vesting in her the full title.

Plaintiff's evidence goes no further than to show that after this conveyance he and his wife had occupied this dwelling house and that the plaintiff (husband) had collected the rents from same and used the money thus collected as his own. The court instructed the jury that if defendant's agent issuing the policy knew the condition of the title at the time of doing so, then the fact that the title was in the wife will not prevent plaintiff's recovery, provided plaintiff was in control and possession of the property collecting the rents thereof. If it should be deemed material, there is no showing made that the wife had agreed, verbally or otherwise, to hold this property for the husband or to reconvey it to him at any time, or that she agreed to let him hold or use it as his own, or collect and use the rents therefrom for any length of time. It is just such possession and control of the wife's property by the husband as naturally grows out of the marital relations and his collection of rents by her sufferance.

The question arises as to whether the husband had any insurable interest in this property of his wife. If he had not, the policy of insurance is void as against public policy, and the question of waiver, by reason of the agent's knowledge of the title being in the wife,



cuts no figure. The defendant company could not be held to a contract on the principle of waiver which it could not make in the first instance. [Agricultural Ins. Co. v. Montague, 38 Mich. 548; Tyree v. Virginia F. & M. Ins. Co., (W. Va.) 46 S. E. 706; Planters' Mut. Ins. Co. v. Loyd, (Ark.) 75 S. W. 725.] It is so universally held that contracts of insurance are void unless the insured has some insurable interest in the subject-matter thereof, that we will not enter into any discussion of that principle. The rule is so announced in several of the cases herein cited and assumed in the others.

As to the husband having any insurable interest in his wife's real estate, the rule is stated in 19 Cyc. 589, thus: "Under statutes giving a married woman the right to acquire and hold real estate free from any control of her husband thereover or any liability thereof on account of his debts, the husband of such married woman has no insurable interest in her real property thus acquired and held; nor does it constitute an insurable interest on the part of the husband that a conveyance by the wife of her separate estate in property acquired from the husband can only be made by his joining in the deed." In *Bassett v. Farmers' & Merchants' Ins. Co.*, (Neb.) 122 N. W. 703, the husband had purchased and caused to be conveyed to his wife a farm. The husband insured the dwelling house thereon in his own name. In a suit on this policy, the court said: "In jurisdictions where the lawmaking power has completely emancipated a married woman's property from the control of her husband, the possibility that he will receive a benefit from the real estate of which she may die seised is not considered an insurable interest during her lifetime. . . . So far as the proof goes, plaintiff holds possession of the farm by sufferance of his wife, and not by force of any lawful or equitable right. Counsel argue that Mrs. Bassett has only a dry, naked, legal title to the farm,

and that the beneficial one is in plaintiff, but the difficulty is that the proof does not sustain that assumption. Mrs. Bassett did not testify, nor has plaintiff stated, that there was any arrangement between himself and wife, oral or otherwise, by which he was to have a life estate in the farm." In *Oatman v. Bankers' & Merchants' Mut. Fire Relief Ass'n (Ore.)*, 133 Pac. 1183, the court said: "In an action on an insurance policy, the plaintiff must allege and prove that the insured had an insurable interest in the property, both at the time of the making of the contract of insurance and at the time of the loss. [Cases cited.] In this State a husband has no insurable interest in his wife's property. [19 Cyc. 589.]" In *German-American Ins. Co. v. Paul*, (Ind. Ter.) 53 S. W. 442, the court considered this question under the laws of Arkansas then in force in the Indian Territory. The court there said: "We are unable to find any decision of the Supreme Court of Arkansas upon this subject, but other States, with statutes giving married women no greater rights and control over their separate property than those prescribed by Mansfield's Digest, hold that such insurable interest does not vest in the husband. . . . And this section is in force in the Indian Territory. Under it the husband has no control over the wife's property. In order to create an insurable interest, the insured must be in a position to be damaged by the destruction of the property. Under our statute, the wife's property is her own absolutely, to do with it as she pleases; and, as far as the rights of the husband in it are concerned, it might as well belong to a stranger." The Supreme Court of Arkansas in *Planters' Mut. Ins. Co. v. Loyd*, 75 S. W. 725, made the same ruling and said: "Under statutes similar to ours the authorities generally hold that the husband has no insurable interest in his wife's property . . . There are authorities which hold that the husband has an insurable interest in the property of his wife; but

these are usually based upon statutes giving him some interest, or upon conditions in the relations of the parties to each other and the property which under the common law would give an interest in his wife's property." The Supreme Court of Maine considered a case where the husband had conveyed to his wife and then insured in his own name. [Clark v. Dwelling-House Ins. Co., 17 Atl. 303.] The court there said: "The next question is one of law. Has a husband, under the laws of this State, an insurable interest in property which he has conveyed in fee-simple to his wife as late as the year 1874? Our statutes seem to have removed the last vestige of the common-law marital rights of a husband in the real estate of his wife, however she may have acquired it. His only rights now in real estate he conveys to his wife are a naked veto of a conveyance by her in fee, and a possibility of taking by descent from her, at her decease, depending on his survivorship and her solvency. . . . The burning of this house undoubtedly subjects the plaintiff to inconvenience, and perhaps to the expense of providing another home. So would he, had he been living rent free and at sufferance in the house of his father or brother or son, in which he had no estate. While he may be affectionately concerned about his wife's property, we do not see that he has any pecuniary interest in it, legal, equitable, or even ponderable, or which the courts can measure, or which he can insure under our law." To the same effect is Traders' Ins. Co. v. Newman, (Ind.) 22 N. E. 428, and Tyree v. Virginia F. & M. Ins. Co., (W. Va.) 46 S. E. 706.

There is probably no State in the Union where the laws have more completely deprived the husband of marital rights in his wife's property than in this State. [Sections 8308, 8309, R. S. 1909]. Under these statutes, her real estate, belonging to her before marriage or coming to her during coverture, by *gift*, bequest or inheritance, or by purchase, and all income,

increase and profits thereof, is and remains her separate property and under her sole control. It is specially provided that the husband's use, occupancy, care or protection of her property shall not be taken as reducing the same to his possession unless by her express assent in writing. The wife's right to the possession, income, use and control of her property during coverture is absolute. [Woodward v. Woodward, 148 Mo. 214, 49 S. W. 1001; Brown v. Brown, 124 Mo. 79, 27 S. W. 552.] She may even sue her husband in equity to prevent his using or controlling her property, or interfering with her possession of the same. [Woodward v. Woodward, *supra*.]

The plaintiff relies on the case of Travis v. Continental Ins. Co., 32 Mo. App. 198, and, on a second appeal, 47 Mo. App. 482. We think that an examination of the facts of that case will show a wide distinction between that case and this one. That case related to insurance on personal property. It is there said that the husband had possession of this personal property, claiming it as his own by virtue of a transfer of it from his wife, and, if this claim was made in good faith by him, he had an insurable interest in the property. It is said that because the title of the insured to the property is defective, this will not deprive him of his insurable interest, if he is in possession under a bona-fide claim of title, legal or equitable. The court allowed plaintiff to recover on proof that he was in possession of the goods claiming in good faith to be the owner thereof, and the only defect in his title was that his wife had not transferred same to him in the exact manner described by law, so that his title was merely defective. In the present case the title is by deed and of record and the plaintiff was not in possession and was not claiming, in good faith, to be the owner of this property. He was not claiming under a defective conveyance, or any conveyance at all.

He concedes that the property belonged to his wife and that the title was in her.

The English case of *Lucena v. Craufurd*, 3 Bos. & Pull. 75, 2 N. R. 269, covering sixty-one printed pages, contains an interesting discussion of what constitutes an insurable interest. It is there held that a mere expectation, although amounting to a moral certainty that one will have an interest in property, does not give an insurable interest. "Where there is an expectancy coupled with a present existing title, there is an insurable interest. . . . That expectation, though founded upon the highest probability, was not interest, and it was equally not interest, whatever might have been the chances in favour of the expectation."

It results, therefore, that plaintiff cannot recover on this policy for the reason that he had no insurable interest in the property insured. The case will, therefore, be reversed.

*Robertson, P. J., and Farrington, J., concur.*

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CARTHAGE STONE COMPANY, Respondent, v.  
THE TRAVELER'S INSURANCE COMPANY,  
Appellant.

Springfield Court of Appeals, December 12, 1914.

1. **INSURANCE: Indemnity Insurance: Statement of Facts.** Suit on a policy of indemnity insurance against damages arising from personal injuries. Statement of case.
2. **APPEAL AND ERROR: Verdict: Binding Effect.** The finding of a jury on contested facts, under proper instructions, is binding on the appellate court.
3. **DAMAGES: Payment: Liability of Another: Duty to Minimize Damages.** It is the duty of one who has to pay damages, for which he intends to hold another liable, to mitigate and minimize the damages paid so far as can reasonably be done.

## Stone Co. v. Insurance Co.

4. **INSURANCE: Indemnity Insurance: Settlement of Claim: Rights and Liabilities.** Plaintiff carried indemnity insurance. A duty devolved upon it as the insured to settle claims against it on the most advantageous and reasonable terms without losing its own rights to recover against the insurer.
5. ———: ———: **Rights and Liabilities of Parties.** Under contract of indemnity insurance, the refusal of the insurer to defend a case with the insured's knowledge of that fact, gives the insured a right to settle the case in good faith, keeping in view the principal that the insured should so deal with the case as to minimize, as much as possible and reasonable, the damages to be charged against the insurer.
6. ———: ———: **Duty to Minimize Damages.** Defendant, an indemnity insurance company, refused to defend a suit for damages against insured on the ground that no notice of the injury had been given it, but notified insured that settlement could be made for \$150 and its duty to minimize the loss. Insured allowed judgment to go against it by default for \$3000, the full amount claimed. The rule as to one's "duty to minimize the damages" held to apply. (FARRINGTON, J., dissenting.)

Appeal from Jasper County Circuit Court, Division  
No. Two.—*Hon. D. E. Blair*, Judge.

**REVERSED AND REMANDED.**

*O. C. Mossman and McReynolds & Halliburton*  
for appellant.

(1) Plaintiff is not entitled to recover because notice of the injury was not given defendant as provided by the policy. *Anderson v. Frankfort Accident & Plate Glass Ins. Co.*, 9 Cal. App. 473, 99 Pac. 537; *London Guarantee & Accident Co. v. Siwy*, 35 Ind. App. 340, 66 N. E. 481; *Australian Accident Ins. Co.*, 19 Victoria (Australia) 139; *Underwood Veneer Co. v. London Guarantee, etc., Co.*, 100 Wis. 378, 75 N. W. 996; *Nat'l. Paper Box Co. v. Aetna Ins. Co.*, 170 Mo. App. 370; *Cooley's Briefs on Insurance*, 3570; *Columbia Paper Stock Co. v. Fidelity and Casualty Co.*, 104 Mo. App. 157; *Myers v. Travelers Ins. Co.*, 62 Oh. St. 760, 57 N. E. 458; *London Co. v. Siwy*, 66 N. E. (Ind.) 481;

Underwood Veneer Co. v. London Co., 100 Wis. 378, 75 N. W. 996; Employers' Liability Assurance Corp. v. Light Co., 28 Ind. App. 473, 63 N. E. 54; Wolverton v. Fidelity & Casualty Co., 190 N. Y. 41, 16 L. R. A. 400; Smith-Dove Co. v. Insurance Co., 171 Mass. 357, 50 N. E. 516; Deer Trail Mining Co. v. Maryland Casualty Co., 36 Wash. 46, 78 Pac. 135; Crotty v. Casualty Co., 163 Mo. App. 636; Donnell Mf'g Co. v. Hart, 40 Mo. App. 512; Burgess v. Ins. Co., 114 Mo. App. 189; McFarland v. Accident Association, 124 Mo. 214. (2) Defendant having declined to defend the case of D. O. Perry v. Carthage Stone Company and notified plaintiff of that fact and that plaintiff must defend, it was the duty of plaintiff to make the loss as small as possible so far as it reasonably could. Fisher v. Goebel, 40 Mo. 275; Mandell v. Fidelity, etc., Ins. Co., 170 Mass. 173, 49 N. E. 110; Southern Ry. News Co. v. Fidelity, etc., Co., 83 S. W. 620; Barnett & O'Neil v. Grain Co., 153 Mo. App. 464; State, ex rel. v. Rice, 44 Mo. 436; Harrison v. Railroad, 88 Mo. App. 36; Dietrich v. Railroad, 89 Mo. App. 36; Knight Bros. v. Railroad, 122 Mo. App. 38; Vincil v. Railroad, 112 S. W. 1030.

*Bailey & Bailey and Howard Gray for respondent.*

(1) Appellant contends that the policy required respondent not only to give notice of the accident, but notice of the claim for damages when it was made. No such issue was submitted by the pleadings. In appellant's answer it set up that it refused to defend the cause because no notice of the accident had been given. This was a waiver of the clause requiring notice of claim. LaForce v. Insurance Co., 43 Mo. App. 518. (2) Failure to give notice was a matter which defendant was required to plead affirmatively and could not be raised by general denial. Hilburn v. Insurance Co., 140 Mo. App. 355; Burgess v. Insurance Co., 114 Mo.

App. 169; *Hester v. Fidelity etc. Co.*, 69 Mo. App. 186. (3) The rule requiring a party to mitigate his damages arising from a breach of contract does not require him to deal with the party who has breached his contract, and to pay him more or to give him any advantage that he did not have under the original contract. *Camfield v. Sauer et al.* 189 Fed. 576; *DeLafield v. J. K. Armsby Co.*, 116 N. Y. Sup. 71.

STURGIS, J.—This suit is on a policy of indemnity insurance against damages arising from personal injuries. Because the plaintiff and defendant could not agree as to which of them should pay \$150 in settlement of a personal injury case for \$4000, this court must determine which of them shall bear the burden of paying \$3000, with interest and costs for the same claim.

So far as necessary to a decision of this case, the facts are these: The policy in question provides that the defendant shall indemnify the plaintiff against loss by reason of liability imposed upon it by law for damages on account of bodily injuries accidentally sustained; that it will defend in the name and on behalf of the insured any suit which may be brought at any time against it on account of such injuries, including suits that are groundless, false or fraudulent; that it will pay the costs of such suit taxed against the insured, with interest on the judgment and expenses incurred for investigations, negotiations or defense. The policy further provides that the insured shall not voluntarily assume any liability, settle any claim, or incur any expense without the consent of the company; that no action shall lie against the company to recover for any loss except for loss actually sustained and paid by the insured in money in satisfaction of a judgment after trial of the issues.



While this policy was in force, one D. O. Perry was in April, 1909, injured while in plaintiff's employ and working in its mill by reason of alleged defective machinery. No suit was brought for such injury until on November 2, 1911, two and half years after the injury, although it appears that said Perry was making some claim to this plaintiff for his injury prior to that time. He then brought suit against this plaintiff for \$4000, based on its negligence. On summons being served on this plaintiff, defendant in that case, it at once mailed the summons to this defendant at its Kansas City, Missouri, address. This defendant promptly replied, notifying plaintiff that it had never received any notice of Perry being injured. To this plaintiff made no reply, and, on November 17, 1911, the defendant by its attorneys again wrote this plaintiff as follows: "In the matter of the case of David O. Perry v. Carthage Stone Company, returnable to the November Term, 1911, circuit court for Jasper county, Missouri, we, as local attorneys for the Traveler's Insurance Company are instructed to notify you that the company has been waiting to hear from you as to whether or not this case was ever reported to the Traveler's Insurance Company; that they have no record of it and to date have not received any information from Mr. Logan as to whether the case was reported at the time. Pending the receipt of this information, they instruct us to advise your company and Mr. Logan on behalf of the Traveler's Insurance Company that the Traveler's Insurance Company will file through us the necessary pleadings in the case to protect against a default but that our action in so doing shall not be a recognition of liability on the part of the Insurance Company for the case, and shall be without prejudice to the rights of either party." The Mr. Logan referred to was the secretary and general manager of the plaintiff company. To this the present plaintiff, defendant in that case, made no response

and the case drifted along until January 5, 1912, when this defendant notified plaintiff that it had, as before stated, appeared by its attorneys on notice to this plaintiff that it did not admit liability by so doing and did so to prevent the case going by default until it could determine its liability to plaintiff on account of the claimed injury, and adds: "We have been instructed by the Traveler's Insurance Company to withdraw as attorneys in that case, and to notify you that it will be necessary for you to employ attorneys to look after and defend that case, as the Traveler's Insurance Company has decided that it is not liable to you for the injuries alleged and sued for in that case. So you are hereby notified that we, as attorneys for the Traveler's Insurance Co., will not appear further in that case in the defense thereof, and that, if you desire to defend in that case you will employ attorneys to defend in your behalf." The attorneys for this defendant formally withdrew from the case on February 19, 1912. This plaintiff, though defendant in that action, paid no attention to the case and it drifted along. About April 5, 1912, a representative of this defendant went to Carthage, Missouri, for the purpose of further investigating the status of this damage suit, repeatedly sought an interview with Mr. Logan, the plaintiff's manager, who refused to see him but said, when called over the telephone, that he had already given all the information he had to give. In this conversation over the telephone, defendant's representative told Mr. Logan he had interviewed Mr. Perry's attorney and explained to him why his company had refused to defend the case on account of receiving no notice of the injury until after suit was brought and that Perry's attorney had told him the case could be settled for \$150. This evidence as to Logan's refusal to interview this representative of defendant and what was said over the telephone was

excluded by the court, but is here in the form of a deposition.

On the return of this representative of the defendant to Kansas City, Missouri, this defendant wrote, under date of April 8, 1912, and plaintiff received the following letter: "I wish to formally advise you that the case of Perry against your company can be settled for \$150. Inasmuch as the Traveler's Insurance Company have declined the defense of this case, of which fact you have heretofore been informed, I desire to say that that company by way of compromise offers to pay one-half of the suggested amount of \$75, for a release and a stipulation for dismissal in the case."

"I wish also in this connection to advise you that it is your duty to mitigate the damages as much as possible, and that your claim against the Insurance Company can only be for such amount as was necessary for you to pay in settlement of the case." This letter was also excluded by the court. To this plaintiff made no reply and took no action in the defense of the case whatever. At the next term of the circuit court, on June 13, 1912, a default was taken in the case of Perry against this plaintiff, and on inquiry of damages a judgment was entered for \$3000. On July 8, 1912, this default judgment was, on the application of the then defendant, plaintiff here, set aside on the ground that said Perry had agreed with this plaintiff, the Carthage Stone Company, not to prosecute the case to judgment, provided this plaintiff had to suffer the loss. The case then went over to December, 1912, and, being again reached on the docket, a default was again entered and damages assessed and judgment rendered for \$3000. A vigorous attempt was thereafter made by the then defendant to again have the default judgment set aside on the ground that the plaintiff, Perry, had solemnly agreed not to take any judgment against this plaintiff and led the then de-

fendant to believe that he had dismissed said case, thereby misleading this plaintiff, the defendant there, and preventing its making a meritorious and valid defense which it swore it had thereto. The refusal of the Court to set aside this second default judgment in Perry v. Carthage Stone Company was the basis of the appeal of that case to this court; 173 Mo. App. 414, 158 S. W. 887.

The present plaintiff was thereupon compelled to pay the \$3000 judgment so taken against it by default with the interest and costs, and thereupon brought this suit on the policy of indemnity insurance to recover the amount so paid. The petition alleges the terms of the policy; the injury to Perry during its life; his bringing suit and the defendant's refusal to defend same on notice; the judgment against this plaintiff and its subsequent payment. The answer sets up that no notice of the injury was given to the defendant; that Perry's injuries were the result of his own negligence and pleaded the foregoing facts as to plaintiff's neglect and refusal to either defend or settle the case on the notice given to it. The plaintiff replied by general denial which included a denial that it was not negligent in causing Perry's injury and that Perry was negligent. On the trial, plaintiff, in order to avoid the effect of the default judgment against it, assumed the burden of trying the Perry case *de novo* and proving its own negligence in causing Perry's injury and disproving Perry's negligence either as causing or contributing to his injury, using Perry as a witness for that purpose. It also admitted that its failure to defend the Perry suit was largely due to Perry's repeated promises to it that he would not collect anything off of this plaintiff which would be a loss to it.

The question of plaintiff's failure to give notice to defendant of Perry's injury was contested and resolved against the defendant by the jury. This is

binding on us and we will not say that the finding is even against the weight of the evidence, though we can say that defendant's claim on this line appears to have been in good faith and that the notice which plaintiff swore, and the jury found, was mailed to defendant at its Kansas City, Missouri, address was either lost in the mail or mislaid by some clerk and failed of its purpose in affording the defendant an opportunity to investigate the facts of the injury soon thereafter. [Nat. Paper Box Co. v. Aetna Life Ins. Co., 170 Mo. App. 361, 370, 156 S. W. 740, and cases cited.]

These matters are mentioned chiefly as bearing on the question which we think is decisive of this case, to-wit, plaintiff's failure to settle the Perry injury suit for \$150, on defendant's notice and permission to do so, as defendant offered to prove, and to thus limit defendant's liability to it to that amount. Learned counsel for plaintiff does not controvert the general principle that it is the duty of one having to pay damages for which it intends to hold another liable to mitigate and minimize the damages paid so far as it can reasonable do so. They further concede that this principle is applicable to indemnity insurance contracts and the insured's duty to settle claims against it on the most advantageous terms when it can do so without losing any of its own rights to recover against the insurer. On this point both parties cite Fidelity & Casualty Co. v. Southern Ry. News Co. (Ky.), 101 S. W. 900, as follows: "Resting this defense upon the ground that the news company was obliged to minimize in every reasonable way the damage it might recover under its contract, there is no dispute about the correctness of the legal proposition that it is the duty of one whose contract rights are violated to do all reasonable within his power to mitigate the damage and lessen the amount of his loss. [Sutherland on Damages, sec. 88.] And if in the case before us the

news company had been permitted to exercise its own judgment and discretion in the matter, and it could have settled the loss for \$2500, but without reasonable excuse failed or refused to do so, we would have no hesitation in holding that its recovery against the insurance company must be limited to the sum for which the claim against it could have been settled." See also this same case in 83 S. W. 620. In commenting on this authority, plaintiff, in its brief, says: "There is another reason why the rule has no application in this case. Wherever a person under the general rule now under consideration has paid a sum to mitigate his damages, he has had the right to recover that sum from the wrongdoer, but in this case appellant required the respondent to release one-half of its claim against it for damages. If the appellant had said—the case can be settled for \$150 and you may settle for that amount and we will litigate the question as to whether it was our duty to defend the case, and if the issue is found against us we will agree that the judgment may be for \$150 and your costs to date, and then respondent had refused to settle but let judgment go by default for a larger sum; another question would be presented."

Plaintiff also concedes that although the policy provides that no liability arises except "for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issues," yet, if the insurer refused to defend this case after notice to it to do so, it thereby violated its contract and waived the condition requiring a trial of the issues and that the insured was then privileged to settle the case on the most advantageous terms and recover from the insurer the amount so paid. [Butler v. American Fidelity Co., 120 Minn. 157, 139 S. W. 355, 44 L. R. A. (N. S.) 609; St. Louis Dressed Beef & Pro. Co. v. Maryland Casualty Co., 201 U. S. 173, 50 L. Ed. 712.] The purport of these cases is that the refusal of the insurer

to defend a case with the insurer's knowledge of that fact gives the insured a right to make settlement of the case or to try it in good faith, having in view the principle that the insured should so deal with the case as to minimize as much as reasonable the damages to be charged against the insurer. In such case the insured should not of course be chargeable for any honest error of judgment or for any mistake made while acting in good faith. [Butler v. American Fidelity Co., *supra*.]

The privilege given by the insurer becomes a duty by the insured. The duty cast on the "holder" or owner of property to minimize the damages to which he intends to hold another, presupposes that such holder is without blame and exists even in favor of a wrongdoer and does not arise because or after the holder undertakes to minimize the damage and is negligent in the manner or means of doing so. It is stated in 13 Cyc. 71, that: "Where an injured party finds that a wrong has been perpetrated on him, he should use all reasonable means to arrest the loss. He cannot stand idly by and permit the loss to increase, and then hold the wrongdoer liable for the loss which he might have prevented." And, in 1 Sutherland on Damages (3 Ed.), sec. 88, that: "The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible." This rule applies to injuries arising either from tort or breach of contract. [13 Cyc. 72 & 75; 1 Sutherland on Damages (3 Ed.), sec. 90.]

Applying these principles to the present case, we find that this defendant declined to defend the Perry damage case and so notified this plaintiff, giving its reasons therefor based on the claimed failure of the plaintiff to give it notice of the injury promptly after its occurrence. Defendant further notified plaintiff that it would have to look after and defend that case.

After so doing, the defendant, by its letter of April 8, 1912, heretofore set out, notified this plaintiff, the defendant in the Perry case, that such case could be settled for \$150. The letter then contains two distinct propositions. The defendant, as insurer, offered to pay one-half of this amount and make a complete and final settlement of the whole matter. It further notified the plaintiff in case this compromise proposition was not acceptable, that it was this plaintiff's duty to mitigate the damages as much as possible and that its claim against the defendant insurance company could only be for such amount as it was necessary for it to pay in settlement of the case, to-wit, \$150. It seems plain to us that this letter and notice not only gave this plaintiff the privilege of settling this suit for \$150, (its refusal to defend did that) but distinctly warned it that it was its duty to do so in order to mitigate the damages as much as possible and that its claim against the insurance company would be limited to that amount. Had this plaintiff acted on this letter and, declining the compromise feature of it, had settled the case for \$150, we think no court would have hesitated a moment to have said, under the facts here shown, that the plaintiff was privileged to do so and would have denied the present defendant any defense on the ground that the plaintiff had settled the claim without its consent. It was unreasonable to say the least for plaintiff to refuse to pay \$150 in settlement and without doing anything permit judgment to go by default for \$3000. It is true that this defendant would have preserved its right to defend against *any* claim by plaintiff because of the claimed failure of plaintiff to give it notice of the injury promptly after its occurrence, but that is a right which we think it had a right to preserve. Had this defendant paid the \$150 in settlement of the claim, as plaintiff contends it should, it would have had no right whatever to recover back or to make itself whole, however just and true might be



its claim that no notice of the injury had been given to it. All the books hold that the relinquishment of a claim or defense is a thing of value—a valuable consideration—regardless of how worthless it may prove to be at the end of a lawsuit. The final determination has no such retrospective effect. These parties were not on an equality (except as to the proposed compromise which plaintiff could rightfully decline) with reference to the payment of the amount necessary to a settlement of this case. The plaintiff could (on declining the compromise feature for each to pay one-half in full settlement) recover from the defendant the amount so paid, provided it could make good, as it afterwards did, its claim that it had given notice to defendant of this injury. The defendant by so doing would have lost its defense of nonliability and been put the amount so paid without chance to recover.

We do not say that this plaintiff might not under the circumstances here have refused to pay the \$150 offered in settlement had it done so in good faith on the ground that the amount was unjust and excessive, or that it had a good and meritorious defense against *any* liability to Perry and had thereafter interposed such defense in the trial of that case. The fact that on the trial of such issues the court or jury might have found against such claim and rendered a judgment largely in excess of the offered settlement, even up to \$3000, would not have necessarily prevented this plaintiff from recovering in this action the amount of such judgment with costs and expenses of defending that suit. Such action by the plaintiff might have raised a question of negligence or lack of good faith. The court in order to meet plaintiff's view as to why it had not defended the Perry damage case gave an instruction, "C", to the effect that when this defendant notified this plaintiff that it would not defend the Perry suit and that plaintiff should defend the same by its own attorneys, that it then became and was this plaintiff's

*duty to make all the defenses it honestly could* against the claim of Perry both as to his right to recover and the amount of the recovery; and that if it be found that plaintiff did not make a defense to such suit which it could have made honestly but let judgment go by default, then plaintiff is not entitled to recover in this case. The plaintiff was thereby excused from making any defense in that case because it knew it had no honest defense to make. If it knew this, why should it refuse to pay \$150, which Perry offered to accept in settlement of the case, and let judgment go against it by default for \$3000? In the Perry case this plaintiff, though sued for \$4000 and warned by a previous judgment by default, set aside as a favor to it, as to the amount of damages the court would allow, refused to pay the \$150 offer with no intention to raise any defense in that case and soon thereafter let judgment go by default for \$3000 knowing that it would have to pay such judgment. By its refusal either to settle or defend, it chose to make the insurer's liability to it \$3000 instead of \$150.

We think the facts of this case clearly bring the plaintiff within the rule conceded by it, that a person under the general rule now under consideration should pay a sum to mitigate his damages when he has the right to recover that sum from the wrongdoer; and that this defendant did in effect say to the plaintiff that this case can be settled for \$150 and you may settle for that amount and we will litigate as to whether it was our duty to defend the case and if the issue is found against us, the judgment may be for \$150 and your costs to date.

The defendant offered testimony to prove that the Perry case could have been settled for \$150 after defendant here had notified the plaintiff that it would not defend the case, all of which was refused. This, it is apparent from what we have above stated, was error. Defendant requested an instruction, "D",

along this line, but, as all the evidence on which it was based was excluded, the court could not give the same. If on another trial defendant's evidence shows the facts as it now contends, and the same are not admitted or uncontradicted, an instruction along this line will be proper.

For the error of the court in refusing to submit testimony as to the alleged offer of settlement, it becomes necessary to reverse the judgment and remand the cause.

*Robertson, P. J.*, concurs in holding that the rule as to mitigation of damages applies in this case, and in the result. *Farrington, J.*, dissents in a separate opinion and deems the majority opinion in conflict with certain decisions of the Supreme and other appellate courts therein specified.

The cause is therefore certified to the Supreme Court.

### DISSENTING OPINION

FARRINGTON, J.—Plaintiff recovered a judgment against the defendant for three thousand dollars. The suit was based on a policy of insurance issued by the defendant by which it undertook to insure the plaintiff against loss by way of damages arising from personal injuries sustained by the latter's employees, and furthermore to take charge of any claim that was made and of the defense of any action for such injuries.

As I view the contract, it was more than a simple contract of indemnity. The provisions of the policy, pertinent here, are as follows:

“THE TRAVELERS' INSURANCE COMPANY, of Hartford, Connecticut, (Herein called the Company) DOES HEREBY AGREE WITH THE ASSURED named and described as such in the Declarations forming a part hereof, as respects bodily in-

juries accidentally sustained, including death at any time resulting therefrom as follows:

**"INDEMNITY FOR LOSS**

"I. To Indemnify the Assured against loss by reason of the liability imposed upon him by law for damages on account of such injuries.

**"SERVICE**

"II. To Serve the Assured upon notice of such injuries by such investigation thereof, or by such negotiation or settlement of any resulting claims as may be deemed expedient by the company.

**"DEFENSE**

"III. To Defend in the name and on behalf of the Assured any suits which may at any time be brought against him on account of such injuries, including suits alleging such injuries and demanding damages therefor, although such suits, allegations or demands are wholly groundless, false or fraudulent.

**"EXPENSES**

"IV. To pay all costs taxed against the Assured in any legal proceeding defended by the Company, all interest accruing after entry of judgment upon such part thereof as shall not be in excess of the limits of the Company's liability as hereinafter expressed, all expenses incurred by the Company for investigation, negotiation or defense, and the expense incurred by the Assured for such immediate surgical relief as shall be imperative at the time any such injury is sustained.

**"THIS AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS:**

**"NOTICE**

"D. The Assured upon the occurrence of an accident, shall give immediate written notice thereof to the Company, or to its duly authorized agent, with the fullest information obtainable. He shall give like notice with full particulars of any claim on account of

such accident. If, thereafter, any suit is brought against the Assured he shall immediately forward to the Company every summons or other process served upon him. The Assured, when requested by the Company shall aid in effecting settlements, securing evidence, the attendance of witnesses and in prosecuting appeals. The Assured shall not voluntarily assume any liability, settle any claim or incur any expense except at his own cost, or interfere in any negotiation for settlement or legal proceeding without the consent of the Company previously given in writing.

#### "RECOVERY

"E. No action shall lie against the Company to recover for any loss under PARAGRAPH I foregoing, unless it shall be brought by the Assured for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue, and no such action shall lie to recover under any other agreement of the Company herein contained unless brought by the Assured himself to recover money actually expended by him. In no event shall any such action lie unless brought within ninety days after the right of action accrues as herein provided. . . ."

During the time this policy was in force an employee of the plaintiff, named Perry, was injured. Some two years after the injury occurred he brought suit against plaintiff herein for four thousand dollars. His petition, when served on the stone company, was immediately forwarded to the insurance company and it acknowledged receipt thereof but informed the stone company by letter that it had no record of ever having been notified of the injury at the time of its occurrence as required by the policy; that it would, however, file such pleas as would prevent a default judgment and in the meantime determine whether the notice was given and in that way decide whether it was liable under the policy. A motion for security for costs and a demurrer were filed by the insurance company's law-

yers. Afterwards it determined for itself that no notice was given by the assured and subsequently notified the assured that its lawyers would withdraw from the defense of the Perry damage suit. However, there is no evidence that the petition and other papers of the suit were ever returned at this or any later time. Both the assured and the insurer did nothing and a default judgment was entered in Perry's favor for three thousand dollars. Plaintiff herein then asked that that judgment be set aside, which was done. The adjuster of the insurance company appeared on the scene in April, and although his company had long prior thereto disclaimed any liability under the policy or interest in the Perry suit, he saw Perry's lawyer and ascertained that the Perry case could be settled for one hundred and fifty dollars. The insurer made no offer to settle for that amount but still protested its nonliability. The insurance company then wrote the following letter to the assured, dated April 8, 1912, on which no action was taken by either party: (Formal parts omitted.) "Dear Sir: I wish formally to advise you that the case of Perry v. your Company can be settled for \$150. Inasmuch as the Travelers' Insurance Company have declined the defense of this case, of which fact you have heretofore been informed, I desire to say that that Company by way of compromise offers to pay one-half of the suggested amount, or \$75, for a release and a stipulation of dismissal of the case.

"I wish also in this connection to advise you that it is your duty to mitigate the damages as much as possible, and that your claim against the Insurance Company can only be for such amount as was necessary for you to pay in settlement of the case.

"While in your city on the 5th inst. I took this matter up with Mr. J. D. Harris, attorney for the plaintiff, and advised him as to our position.

"You may consider this proposition open for ten days.

“Awaiting your early reply, I am, . . .”

The Perry suit again came on for hearing and no defense was made, resulting, after an *ex parte* hearing, in Perry being awarded a judgment for three thousand dollars, which the plaintiff in this case was compelled to and did pay.

This suit is brought to recover from the insurance company the amount the plaintiff herein was required to pay on the Perry judgment.

The plaintiff offered in evidence the policy and the judgment and proved payment thereof, and went into the question of its liability to Perry and the amount that Perry was damaged. The jury found a verdict for three thousand dollars which went to a judgment, thus finding that plaintiff was insured, that defendant was liable, that Perry's damages were three thousand dollars, that plaintiff was liable to Perry, and that plaintiff gave written notice of the injury at the time it happened. There was evidence tending to prove each of these findings.

A number of defenses were made by the insurance company, two of which are held to be good by the majority opinion, and as it is on these points that I differ with my associates my opinion is confined to them. First, it is contended that the letter of April 8, 1912, should have been admitted in evidence to show that Perry's case could have been settled for one hundred and fifty dollars, and that plaintiff, knowing this, should have settled for that amount in order that the damages might be minimized as between it and the insurance company; and second, that the letter was the written consent to settle as was provided for in the policy. I will take up the consent proposition first.

It seems a strained construction to place on this letter to say that it is a written consent given by the insurance company to the stone company to settle with Perry for one hundred and fifty dollars. To do so requires one to read out of the letter the proposition

to compromise; in other words, it is giving the letter a construction most favorable to the one who wrote it, and that is contrary to law. However, the letter speaks for itself, and to my mind was simply an offer on the part of the insurance company to authorize a settlement for one hundred and fifty dollars provided the assured would put up one-half the amount. The most that can be said of the letter is that it gave written consent to the assured to pay out seventy-five dollars of the insurance company's money on a settlement and consent to the assured to pay out seventy-five dollars of its own money. On what theory or by what authority the insurance company assumed to give this "consent," having long prior thereto denied all liability under the policy and long prior thereto asserted its position of "no liability," does not appear, unless, as I construe the letter (in favor of the assured), it was an offer of compromise and not a consent. Consent implies not merely that a person accedes to but authorizes an act. [8 Cyc. 585.] Suppose the stone company, acting on this letter had settled for one hundred and fifty dollars and paid one-half of the amount from its own funds; this would be as much an admission on its part that it had not given the notice as it would have been an admission on the part of the insurance company, had it paid the one hundred and fifty dollars, that it was liable and that it had received the notice at the time the jury in this case found it was received. Viewing the letter from another angle, suppose the stone company had written to the insurance company that it could settle the claim for one hundred and fifty dollars and had recognized what the majority opinion says was the stone company's duty to minimize the damage and had asked the insurance company to pay the one hundred and fifty dollars; and the insurance company had written to pay the said amount if the stone company would pay one-half of it. I think it is taking up useless time



and space to argue that in that case the assured when coming onto the insurance company for its loss would have been limited to the sum of seventy-five dollars.

In clause D of the policy under "Notice," the use of the word "consent" in the last line, in the connection in which it is used I think means that the assured is to get the written consent of the insurance company to pay out the latter's money on a claim. In other words, it is another evidence of the determination on the part of the insurance company to keep its hand in control of all proceedings after an injury occurs under the terms of the policy.

This all goes to show that the rights, obligations, duties and privileges of these parties were fixed at the time the notice was given as found by the jury. This is merely saying that the rights of the parties were fixed by the contract. And while it may be argued that the insurance company could not pay out this one hundred and fifty dollars without recognizing liability to the stone company, it can be argued with equal force that the stone company could not pay out the one hundred and fifty dollars without recognizing the fact that it had not given the required notice. I therefore do not believe that this letter made an offer or gave a consent to the assured to pay out one hundred and fifty dollars, and then, should it be determined that the notice was given that the stone company could hold the insurance company for one hundred and fifty dollars and no more.

The next proposition decided by the majority opinion is that, leaving out of consideration entirely the letter or any written consent, when the insurer disclaimed all liability and the knowledge that a settlement could be made with Perry for one hundred and fifty dollars came to the stone company, it then became the duty of the latter to settle for that amount, and, after doing so, to try the issue in another suit as to whether it gave or did not give the notice—this, be-

cause it was the duty of the assured to minimize the loss as to the insurance company.

I cannot agree to that proposition of law because I think this contract of insurance was more than one of mere indemnity. There was not only an obligation on the insurance company to make good in money any loss sustained by the assured, but the premium was paid for the purpose of having the insurer step in and relieve the assured of the trouble and expense and burden of defending any lawsuit filed by an injured employee, whether it was a valid or fraudulent claim. The contractual relation of the parties established by the insurance policy was that the insurance company would be the party in interest in the defense of such suits or in the settlement of such claims. When a suit was filed, it had agreed in consideration of the premium to step into the stone company's shoes and to make settlement, if it chose, or to fight it out; and not only did the contract do this, but it made a provision that the insurer would not be liable unless it be permitted to absolutely take charge of the defense or the negotiations, and denied to the assured the right to try the lawsuit brought against it or to voluntarily settle or fasten or acknowledge liability without the written consent of the insurance company.

I do not believe that the rule to minimize damage creates a duty on a party occupying the position the stone company occupies under this contract to a party occupying the position the insurance company obligated itself to fill. In other words, the insurance company was the real party in interest in the defense of Perry's suit to the extent of the policy and the assured was what might be termed the "holder" of the lawsuit because necessarily prosecuted against it in name.

As an illustration: An assured owes an insurer that has issued an ordinary fire policy a legal duty to preserve the property remaining after a fire and save as much of the salvage as he can in order to minimize the

loss; but suppose the insurer not only indemnified against loss but specially contracted that when notified of the fire it would in its own way carry out the goods and would itself minimize the loss, and that any act on the part of the assured in saving the property after the fire without the written consent of insurer would nullify the insurer's liability. Having such a contract, suppose the assured stood by the ruins with full knowledge of the fire and with full knowledge that the goods were depreciating and refused to fulfill the duty to save as much salvage as possible and walked away and left the property in that condition. In my judgment the insurer would be in no position to claim that the assured should have saved as much out of the ruins as possible and thus minimized the loss; the legal duty owed by the assured was superseded by the contract of the parties.

Section E under the "Recovery" clause of the policy, which provides that no action shall lie against the insurer to recover "for any loss . . . actually sustained and paid by him (the assured) in money in satisfaction of a judgment after trial of the issue," I think means a trial which was had in which the insurer took part, and performing its contract made a defense for the assured, which resulted in a judgment against the assured. There is no intimation in the policy that the assured will ever defend the case and pay a judgment against it in which case it was to carry on the defense.

I agree with the cases (*Butler Brothers v. American Fidelity Co.*, 120 Minn. 157, 139 N. W. 355, 44 L. R. A. (N. S.) 609, and *St. Louis Dressed Beef and Provision Co. v. Maryland Casualty Co.*, 201 U. S. 172, 50 L. Ed. 712) holding that where the insurance company denies all liability the assured has the privilege, if he so desires, to defend the suit or effect a settlement and then hold the insurance company, as, by the denial of liability the necessity of obtaining consent to settle is done away with. But saying that the assured has the

*privilege* of doing this is far from saying that such privilege accorded him places an *obligation* on him to do so for the benefit of the one who has contracted to assume the primary liability position. The insurance company saw fit to withdraw from the defense of Perry's action. It was then the *privilege* of the stone company to go on and defend, but it certainly had no *duty* to do anything; and especially is this true since it was prohibited from compromising with Perry without the written consent of the insurance company.

There is a materially different relation existing in this case than that presented in the cases of Southern Ry. News Co. v. Fidelity & Casualty Co. of New York (Ky.), 83 S. W. 620, and Fidelity & Casualty Co. of New York v. Southern Ry. News Co. (Ky.), 101 S. W. 900, where it was held that if the insurer does not itself conduct the defense of the action of the insured person against the assured, the latter is bound to make the loss as small as it reasonably can. I will admit that the assured can, if the insurer refuse to do anything, proceed with the cause and defend or settle, and, if he acts in good faith, require the insurer to make him whole to the extent of the policy; and if he so elects to either settle or fight the action on the merits, and does so, then he *must* act in good faith in either making a settlement or making a defense as ordinary prudence and good sense demands; his duty to do this, however, does not begin until he exercises such privilege, and by holding him to a duty to do so after he does exercise such privilege does not in my judgment argue that it was his duty to defend or settle—that is under a policy which is not merely one of indemnity against loss, but under a policy whereby the insurer has contracted that it will, in order to fix liability, be permitted to carry on the litigation in the name of the assured. And when the Kentucky court laid down the rule that the assured must minimize the loss as against the insurer, it was dealing with a case where the as-

sured had elected to act when the insurer had refused. In other words, one may be required to do certain things or be required to conform to a certain standard of action where he voluntarily assumes authority or undertakes to do something, whereas had he done nothing, no liability or obligation would ever have arisen. One may, by affirmative action and assumption of authority, be required to exercise certain duties when the same things would not have been required of him by mere nonaction.

The determining question in this case under the policy seems to me to be: Who was the real party in interest in the defense of Perry's damage suit? I think the policy fixed that relation upon the insurance company, and that, whether Perry's claim was bona fide or fraudulent; and the liability of the insurance company became fastened upon it and it occupied the position of the real party in interest the instant the assured gave the notice that an injury had been suffered by one of its employees. The jury has found, and we must take it as an established fact in dealing with this appeal, that the insurer received the notice; having received it, the defense of the case in court was then up to the insurer, and it was only the duty of the assured to *aid*, and to furnish the suit papers, and all information it was called upon to furnish. Every clause in the policy determines that the insurer occupied the relation of the real party in interest and became the primary party so far as that lawsuit was concerned, whether the claim was valid or fraudulent. As between the assured and Perry of course the relationship remained the same. Even in simple contracts of indemnity, *in equity* the insurer has been held as the real party in interest and the one primarily liable as the principal debtor to the injured party. [Beacon Lamp Co. v. Travellers' Ins. Co. (N. J.), 47 Atl. 579.]

In this case not only did the insurance company contract to undertake the defense but it did in fact file

a pleading in defense of the Perry damage suit. It is true that in its letters written before filing the pleading it was denying that it had received notice and stated that it would file such pleas as would prevent a default, reserving the right *only* of ascertaining whether the required notice had been given. To begin with, I do not think the insurance company should be permitted in one breath to say, "We are going into this law suit to defend" and in the next, "We are not going in to defend." It will be held by its contract to defend, but more so by its actual participation in the proceedings. Its acts should certainly speak louder than a mere form of words in a letter. The only denial of liability at that time was based on the proposition that no notice of the injury had been given, and it seems to me that the stone company's action against the insurance company should stand or fall on the question of the giving of the notice. If the insurer did get notice, it was liable for the amount of the judgment recovered by Perry. It had its day in court on that question. Besides, having taken the steps it did I do not think it should be permitted to withdraw, denying liability on account of not receiving notice, and then refuse to pay, not because the stone company did something wrongful or negligent, but because it did nothing.

It seems to me that the relation existing between the stone company and the insurance company is somewhat similar to that existing between an assignor and an assignee of a chose in action. The common-law implied obligation of the assignor is that he will not interfere with the chose after the assignment, and if he does interfere and does so to the damage of the assignee this renders him liable for any damages resulting from such interference. The assignee is the real party in interest and at common law must have brought the suit in the name of the assignor. There was no duty, as I understand, resting on the assignor to do anything other than to fulfill his express and implied

obligations neither of which was that he would undertake to settle with the debtor or litigate the question with the debtor. If he does undertake it and interferes to the damage of the assignee he can be held for any damage resulting therefrom. But this is far from saying that noninterference or nonaction will cast a liability on him or duty on him to minimize the damage.

I have not gone into the facts of this case and undertaken to discuss the merits of the question whether the notice was given or whether the action of the assured was evidence that the notice was or was not given or whether there was collusion between Perry and the stone company. I take it that on this appeal we must consider it as established that the notice was given immediately after the injury occurred as testified by the stone company's witnesses and believed to be the fact by the jury trying that issue. But I view the case on these salient facts: The insurance company insured the stone company against loss, and was, in case notice of an injury was given in accordance with the terms of the policy, bound to defend the damage suit if one followed and to assume the stone company's burden in case liability was made out; that is, the insurance company was to carry the load to the extent of its policy. The injury occurred and the notice was given. The amount of the damage was established not only in the case of Perry v. Carthage Stone Company but was established again after a trial of the issue by the jury in this case at three thousand dollars. The insurance company did begin and undertake actually to defend that suit, and then, relying on the issue of fact only that no notice was given, withdrew from the defense. The assured according to the terms of the contract was merely to *aid* in the litigation, not to carry it on. It did nothing. The facts were as well known to the insurer as to the assured. The insurer was in equally as good position to make the one hundred and fifty dollar settlement as was the assured.

It was the insurance company's lawsuit primarily because it was the real party in interest in the defense—made so by its own contract for a consideration—and it should be estopped from setting up a failure to act on the part of the assured when it failed to act for its own protection.

The letter of April 8, 1912, was no consent to settle for any more than seventy-five dollars—certainly no written consent upon which it could be held for more than seventy-five dollars; and it is not claimed that Perry or his attorney ever offered to settle for that amount. Consent to do a thing must be unqualified and unconditional.

The construction placed upon the letter of April 8, 1912, in the majority opinion is most favorable to the writer, and it is therefore in conflict with many decisions holding that where a writing is uncertain or ambiguous it must be given a construction most strongly against the writer. [Rochester Mining Co. v. Maryland Casualty Co., 143 Mo. App. 1. c. 561, 128 S. W. 204; Long Brothers Grocery Co. v. United States Fid. & Guar. Co., 130 Mo. App. 1. c. 429, 110 S. W. 29; and McManus v. Gregory, 16 Mo. App. 375.] In this case we need look no further than the answer of the defendant where it puts its own construction on the language of the letter, as follows: "That this defendant as a matter of compromise and adjustment *solely*, and to get rid of any further trouble in regard to said case agreed to pay seventy-five dollars of said one hundred and fifty dollars so offered to be taken by the said Perry."

The duty to mitigate damages on a breach of contract is ordinarily an implied duty raised by the law. I think such duty can be by express contract placed upon either party to the transaction and consequently either party may be by express contract relieved of the duty; that is, the party seeking to invoke such duty can by express contract be estopped from insisting on



it when he has agreed that the other party has been relieved; and this is certainly true where the party on whom it is claimed the duty rests would by his act tending to mitigate the other party's loss place himself in a worse position or be required to relinquish rights that he had under the contract for which rights he had parted with a valuable consideration. The following language was used in the case of *Howard v. Vaughn-Monnig Shoe Co.*, 82 Mo. App. 1. c. 410-411: "Ordinarily, one hired for a definite time and wrongfully discharged prior to that time, should accept an offer to do similar work and his earnings will mitigate the damage. But where the offer of opportunity to so work is made by the wrongdoer in such way, or under such circumstances that its acceptance would force an abandonment of his rights under his contract of employment, he is under no obligation to accept." A privilege to mitigate damages does not necessarily raise a duty to do so. It is not claimed that plaintiff did anything to aggravate the damages. Defendant complains on account of plaintiff's nonaction, and in sustaining this defense the majority opinion is in conflict with the case of *Jarvis v. Railway Co.*, 26 Mo. App. 253. There are many cases, such as *Hurst v. Railroad*, 117 Mo. App. 25, 94 S. W. 794, where there is no duty to mitigate damages; and I think the facts of this case bring it within the rule announced in the case last cited.

I therefore hold that the trial court committed no error and that the judgment should be affirmed, and further hold that the decision of the majority is in conflict with the following cases: *Jarvis v. Railway Co.*, 26 Mo. App. 253; *Hurst v. Railroad*, 117 Mo. App. 25, 94 S. W. 794; *Howard v. Vaughn-Monnig Shoe Co.*, 82 Mo. App. 405; *McManus v. Gregory*, 16 Mo. App. 375; *Long Brothers Grocery Co. v. United States Fid. & Guaranty Co.*, 130 Mo. App. 421, 110 S. W. 29; and *Rochester Mining Co. v. Maryland Casualty Co.*, 143

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Mo. App. 555, 128 S. W. 204. For this reason I ask that the cause be certified to the Supreme Court for final determination.

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**MARY FOWLER, Respondent, v. LEVI BURRIS,  
Appellant.**

**Springfield Court of Appeals, December 12, 1914.**

- 1. DAMAGES: Action Against Surgeon for Malpractice: Pleadings: Allegations as to Financial Condition of Parties: Not Proper, When.** Action against a surgeon for malpractice. No punitive damages were claimed. Allegations in the petition as to the financial condition, poverty or wealth of either party are improper.
- 2. PHYSICIAN AND SURGEON: Skill and Care Required.** It is not sufficient that a physician or surgeon possess ordinary skill and that he use proper and approved methods and appliances in treating patients generally but in treating any particular case he must in that case use proper methods and put in practice his reasonable skill and diligence.
- 3. INSTRUCTIONS: Physician and Surgeon: Malpractice: Erroneous Instruction on Measure of Damages.** Action against surgeon for malpractice. An instruction on measure of damages is examined and considered erroneous because it charged defendant with liability for the results of the original accident which caused the injury as well as for his own negligent treatment.
- 4. ———: ———: Malpractice: Measure of Damages.** Action against surgeon for malpractice in negligently treating plaintiff's dislocated and broken wrist. The surgeon could be held only for increased injury, and pain of mind and body, if any, which may have resulted from his negligent method of treatment together with the impairment of the use of the arm because thereof.
- 5. ———: ———: ———: Degree of Care.** An instruction for plaintiff in an action against a surgeon for malpractice examined and considered erroneous, because it required too high a degree of care and because the language thereof was not clear nor accurate.

Appeal from Stoddard County Circuit Court.—*Hon. W. S. C. Walker*, Judge.

REVERSED AND REMANDED.

*Wammack & Welborn* and *E. F. Williamson* for appellant.

(1) The law requires a physician in treating an injury to exercise only such care and skillfulness as ordinarily careful and skillful physicians exercise, under the same circumstances. *Murdock v. Kimberlain*, 23 Mo. App. 523; *West v. Martin*, 31 Mo. 375. (2) Respondent's instruction number 4, is erroneous, because it directs the jury to compensate the respondent for her injury and for the pain of body and anguish of mind that she has suffered and will suffer because of her injury. The respondent should be compensated only for the damages occasioned her by the neglect and unskillfulness, if any, of the appellant. *Carpenter v. McDavid & Cottingham*, 53 Mo. App. 393.

No appearance for respondent.

STURGIS, J.—This is a suit for malpractice on the part of the defendant, a physician. The petition alleges that the plaintiff accidentally fell and broke and dislocated the bones of her left wrist; that she employed the defendant, a practicing physician, to set, heal and otherwise treat her said injury, which employment the defendant accepted; that defendant did not exercise ordinary skill in the treatment of her injury, but, on the contrary, treated it so carelessly, negligently and unskillfully that the bones of her arm and wrist were not properly set and the dislocation reduced, and that by reason thereof her said wrist became stiff and it and her left arm remained greatly and permanently deformed and wholly useless. She

asks for \$2000 damages. The answer is a general denial and sets up a special defense that plaintiff, in caring for her hand and arm after the injury complained of, was so careless and negligent as to cause any permanent injury she may have suffered; that the plaintiff failed and neglected to follow the directions given by the defendant, and that this negligence on her part and refusal to obey the directions of the defendant in the care of her arm caused the injuries she complains of.

We notice that the petition in this case alleges that the plaintiff is a "widow woman" without property or effects, a common laborer and wholly dependent upon manual labor for a living and support; and that the defendant "possesses considerable wealth." As this case will have to be retried for the errors hereafter mentioned, it is proper to state that under the issues of this case these matters are not proper allegations of the petition. There is no claim for punitive damages and we know of no case holding that, in an action for actual damages based on negligence, the question of plaintiff's poverty or defendant's wealth has any proper place either in showing defendant's negligence or as a basis for estimating plaintiff's damages. The defendant's liability for negligence or the amount of plaintiff's recovery therefor are in nowise dependent on the poverty of the plaintiff or the wealth of the defendant. This applies both to the pleadings and the evidence. By this we do not mean, however, that plaintiff might not properly prove, as showing the extent of her injury and her impaired ability to earn a living, the kind of work she has been engaged in and her inability to follow her usual occupation.

The petition in this case alleges that the defendant is a skilled physician and surgeon. The negligence complained of is that in treating plaintiff's injuries he neglected same and did not use the reasonable skill he possessed. In the case of *Spain v. Burch*, 169 Mo.

App. 94, 101, 154 S. W. 172, this court said that it is not sufficient that a physician possesses ordinary skill and that he use proper and approved medicines and appliances in treating a patient, but that in treating any particular case he must in that case *use* and put in practice his reasonable skill and diligence. The evidence in this case shows that the defendant only treated plaintiff's injuries once. At that time the arm was considerably swollen and the evidence tends to show that it would be difficult to determine the kind or extent of the injuries. Defendant testified that he thought that the arm was only sprained. Plaintiff's evidence shows that he stated at the time that the arm was badly fractured. There is also evidence tending to show that, in case the arm was so badly swollen at the time the physician first examined it that he could not tell whether the arm was merely sprained or the bones fractured, ordinary skill and prudence would require him to dress the arm temporarily and again examine it and give proper treatment a few days later after the swelling had gone down. There is a conflict in the evidence as to whether defendant gave directions to plaintiff to report the condition of the arm in a few days so that defendant could, if necessary, give the same further treatment. He states that he expected the plaintiff to come to his office for further treatment; but there is other evidence to the effect that he gave no directions for her to do so, but, on the contrary, said that his first treatment was all that was necessary. The evidence is also conflicting as to whether the splints used by the defendant in setting the arm and keeping it in position so as to prevent deformity were such as an ordinarily skillful physician would use. The defendant, however, does not complain that there is not sufficient evidence to take the case to the jury.

On the measure of damages, the court gave the following instruction: "The court instructs you, gentlemen, that, if your verdict shall be for the plaintiff,

then, in estimating the amount of damage you will award her, you should take into consideration the character and extent of her injury (if any) whether said injury is permanent; the pain of body and anguish of mind she has suffered, if any, and the pain of body and anguish of mind she will suffer in the future, if any, on account of said injury, and the impairment of her earning capacity, if any, since the — day of May, 1912, on account of said injury, together with all the other facts and circumstances in the case, and assess her damages at such sum as will reasonably compensate her therefor, not to exceed the sum of \$2000, prayed for in the petition." It will be noticed that this instruction proceeds on the theory that plaintiff should be awarded damages for her entire injury and the physical pain and mental anguish resulting therefrom and holds defendant accountable for all impairment of her earning power, provided the jury finds for the plaintiff on the ground of defendant's negligence in treating the injury. The evidence in this case shows and common sense teaches us that a broken arm is itself a serious injury regardless of the way in which it is treated by the attending physician, and that it necessarily results in much bodily pain and mental anguish and that it takes considerable time for the injured member to regain its normal strength and efficiency, and that in many, if not most cases, the injury is more or less permanent and the usefulness of the arm impaired even with skillful surgical treatment. The attending surgeon, therefore, cannot be held liable for all the damages growing out of the injury. He is not responsible for the original injury and its usual and natural consequences with proper treatment. It would be proper for the jury to be told that in estimating the amount of damages they should not take into account the injury and pain of body and mind, or any impairment of plaintiff's strength or earning power due to the breaking of the arm, and that the defendant, if

found negligent, is only to be held in damages for any increased injury and pain of body and mind, or impairment of the use of the arm occasioned by defendant's negligence in his manner of treating the same. [Carpenter v. McDavitt & Cottingham, 53 Mo. App. 393, 403, and cases cited.]

Instruction numbered two, given for plaintiff, is also subject to criticism. This instruction requires that the care and skill a surgeon should use in his practice should be proportionate to the character of the injury he treats. We think that this is true with reference to the care and diligence which he should use in attending an injured person, but it can hardly be said that his skill should increase in proportion to the severity of the injury. One's skill is a matter of slow growth and cannot be increased on short notice. We think also that this instruction requires too great a degree of skill and diligence in treating an injury to say that this should be proportionate to the character of the injury "within the limits of all ordinary skill and knowledge." The language of this instruction is not clear nor accurate and it is apt to be misleading to a jury.

Other minor errors are complained of which are not likely to occur at another trial. It results that this cause must be reversed and remanded.

*Robertson, P. J., and Farrington, J., concur.*

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GEORGE W. BAXTER, Respondent, v. CAMPBELL  
LUMBER COMPANY, Appellant.

Springfield Court of Appeals, December 12, 1914.

1. MASTER AND SERVANT: Injuries: Fellow Servant's Negligence: Jury Question. Evidence in an action for personal injuries received while working in a sawmill examined and it is considered that whether or not the injury to plaintiff was occa-

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sioned by negligence of fellow servants is a question for the jury.

2. ———: ———: Reasonably Safe Place to Work: Jury Question. In an action for personal injuries, under the evidence, the question is considered one for the jury whether or not the place where plaintiff was required to work was a reasonably safe one and whether or not the master had performed his duty in furnishing a reasonably safe place.
3. ———: Injuries to Servant: Safe Place to Work: Master's Rights. The master has a right to do his work in his own way, provided it is done with reasonable care and safety.
4. ———: Temporary Place and Temporary Work: As Bearing On Question of Master's Duty. That the work which the master gives his servant to do is merely for the time being or that the place is temporary is a circumstance to be considered in determining what is a reasonably safe place to work, but does not generally excuse the master as a matter of law.
5. ———: Reasonably Safe Place to Work: Installing Blowpipe in Sawmill. The rule requiring the master to furnish servant a reasonably safe place to work applied to the work of installing a blowpipe in a sawmill for collecting sawdust and shavings from the saws and planes.
6. ———: Supervision of Master: Servant's Reliance on Master's Superior Knowledge and Supervision. Where the servant is working under the surveillance of and in obedience to the direct and peremptory command of the master, quick obedience is required and the servant has a right to rely on the superior knowledge of the master and to obey without careful inspection. He has a right to assume that the master will not send him into a place of danger.
7. INSTRUCTIONS: Master and Servant: Reasonably Safe Place to Work. Action by servant against master for injuries received in a sawmill. Instruction complained of examined in connection with other instructions given and *held* not to impose too great a burden on the master in furnishing a reasonably safe place to work.
8. ———: Considered All Together. The instructions in a case must all be considered together.
9. MASTER AND SERVANT: Negligence: Assuming Risks. A servant does not assume the risks arising from the master's negligence.



10. ———: **Assumption of Risk: Contributory Negligence.** The question of assumed risks and contributory negligence are closely allied and are often treated by the court as being the same.
11. **INSTRUCTIONS: Master and Servant: Assumption of Risk: Contributory Negligence.** Action by servant against master for personal injuries. Instructions examined and read together and considered not misleading, though in form submitting the defense of assumption of the risk instead of contributory negligence.
12. **APPELLATE PRACTICE: Harmless Error: Improper Evidence: Incidentally Admitted: Stricken Out.** In an action against a master by a servant for personal injuries it is not ground for reversal because evidence that defendant held liability insurance and would not be liable ultimately to pay was incidentally admitted into the case, where it was properly stricken out on objection being made.
13. **EVIDENCE: Harmless Error: Concerning Interest of Witness.** In an action against master for personal injuries, plaintiff was permitted to show that defendant's foreman, testifying for his employer, received \$100 per month. If error was thereby committed it was harmless.
14. **DAMAGES: Personal Injuries: Verdict: Excessiveness.** In an action for personal injuries it was shown that plaintiff's leg was permanently injured and its strength and usefulness greatly impaired. A verdict for \$2500 is not so grossly excessive as to warrant the appellate court to require a remittitur.

Appeal from Dunklin County Circuit Court.—*Hon. W. S. C. Walker, Judge.*

**AFFIRMED.**

*Fort & Zimmerman* for appellant.

(1) Respondent assumed the risk of being injured, in the manner and by the means charged, when he undertook to assist in the repair work at appellant's mill. *Saversnick v. Schwarzschild & Sulzberger*, 125 S. W. 1192; *Brandt v. K. C. Breweries Co.*, 141 S. W. 445; *Maynard v. Railroad*, 137 S. W. 59; *Lowe v. Railroad*, 148 S. W. 956; *Smith v. Forrester Nance Box Co.*, 92 S. W. 394; *Jones v. Pioneer Co-op-erage Co.*, 134 Mo. App. 324; *Rowden v. Schoenherr-*

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Walton Min. Co., 117 S. W. 695; Rigsby Oil Well Supply Co., 91 S. W. 460; Butz v. Murch Bros. Construction Co., 117 S. W. 636. (2) This case falls under a well defined exception to the general rule of assumption of risk, in that appellant was only doing temporary, or repair work in its mill, and trying to render an unsafe place, safe for its employees. Rigsby v. Oil Well Supply Co., 91 S. W. 466; Rowden v. Schoenherr-Walton Min. Co., 117 S. W. 695; Bennett v. Crystal Carbonate L. Co., 124 S. W. 612; Bradley v. Railroad, 39 S. W. 766; Henson v. Armour Packing Co., 88 S. W. 167. (3) The court erred in giving instruction number 1 for plaintiff which required appellant to use more than ordinary care to furnish respondent a safe place and appliances with which to work. McElhiney v. Friedman-Shelby Shoe Co., 138 S. W. 60; Henson v. Pascola Stave Co., 131 S. W. 931. (4) Instructions numbers 5, 6 and 7, given for the plaintiff, are tantamount to instructions on the defense of contributory negligence, provided they were proper declarations of law on that defense, but said instructions do not declare the law of the defense of assumption of risk. Bennett v. Crystal Carbonate Lime Co., 124 S. W. 612; Bradley v. Railroad, 39 S. W. 767.

*Bradley & McKay* for respondent.

(1) It is the duty of the master to see that the place and appliances in which and with which respondent was required to perform his work were in such condition that the servant could perform his duties with reasonable safety. Herdler v. Buck's Stove & Range Co., 136 Mo. 3; Sullivan v. Railroad, 107 Mo. 78; Stephens v. Railroad, 96 Mo. 212; Clark v. Iron & Foundry Co., 234 Mo. 436. (2) Respondent did not assume the risk of performing the work in the manner and by the means as directed. Bradley v. Northern Cent. Coal Co., 167 Mo. App. 177; Self v. White, 155

S. W. 840; Rowden v. Milling Co., 136 Mo. App. 376.

(3) When directed by the master to perform certain services, the servant has the right to presume that he will not be sent into a place of danger and the master cannot so direct his servant without assuming the consequences. Parsons v. Hammond Packing Co., 96 Mo. App. 372; Bradford v. Railroad, 136 Mo. App. 711.

(4) The court will not reverse a case upon an improper instruction, unless the same is so misleading as to constitute prejudicial error, and affect substantial justice. The instructions should be taken as a whole and considered together; the ones given for plaintiff and those given for defendant, and it is not to be presumed that the jury ignored those given for defendant and considered only those given for plaintiff in determining to which of the parties the verdict should be given, but that they did their duty and considered the instructions together. Campbell v. City of Stanberry, 105 Mo. App. 64; Sonnen v. Transit Co., 102 Mo. App. 274-276; Pendergrass v. Frisco, 162 S. W. 717; Reams v. Jones D. G. Co., 99 Mo. App. 403; Benjamin v. Railroad, 133 Mo. 274; Robinson v. St. Joseph, 97 Mo. App. 503; Eckle v. Ryland, 165 S. W. 1035; McElhiney v. Shoe Co., 158 Mo. App. 318; King v. King, 155 Mo. 425.

STATEMENT.—The plaintiff sues for personal injuries received while working as a common laborer at defendant's sawmill. At the time of his injury he was one of a gang of men working under the immediate direction of a "boss" or foreman in installing a new overhead conveyor or "blowpipe" used to collect and convey by suction the sawdust, shavings, etc., from the saws and planers to the engine room where this refuse served as fuel. This conveyor or blowpipe was being constructed at a considerable height from the floor and was made of joints or sections of metal pipe about twelve feet long and two feet in diameter, fitted to-

gether like stove pipe, and each section weighed between two-hundred and three-hundred pounds. The sections had been brought in and laid on the floor and were being raised by a block and tackle, the pulley being fastened to the roof. The particular section being raised at the time was one containing side or "flue holes," as they are called, for the purpose of connecting smaller lateral pipes running to the separate saws and planers. These flue holes had the iron turned outward, projecting five or six inches, forming a short lateral pipe into which the lateral pipes were to be fitted. This section of large pipe was to be raised in a somewhat narrow space between the posts and the machinery. It was important that in raising it these projecting flues should not strike against the posts or machinery and be bent or indented.

This section of pipe was not directly under the pulley, being eight to ten feet back of a perpendicular line, so that the rope passing over the pulley came down to it at an angle and was fastened around the section of pipe a little back of the middle. In being raised, this would cause the section of pipe to swing forward as well as upward and the forward end to hang lower than the other.

The evidence shows that the old wooden blowpipe or conveyor had been recently taken down and sections thereof, together with shavings, sawdust and pieces of boards, left lying on the floor around and under this section of pipe. The sections of the old wooden pipe were some eighteen to twenty inches square. There were three sections of this old pipe lying there in a sort of triangle, the section of new pipe resting on one of them. One of the witnesses described it by saying that these sections of old pipe formed a sort of pit around the forward end of the new pipe being raised.

Just as the new pipe was about to start upward by reason of two men pulling down on the other end

of the rope passing over the overhead pulley, the foreman in charge ordered this plaintiff to "get in there and hold that and keep them flue holes from getting mashed." The plaintiff hesitated, as not exactly understanding, and the order was repeated directly to plaintiff. He obeyed, went in and took hold of the forward end of the pipe to steady it, it swung forward and in stepping backward the plaintiff's foot slipped or tripped and he stumbled over the sections of old pipe and was thrown down, by the weight of the pipe, on his knee, dislocating it. The plaintiff testified: "When they went to pull the blowpipe up I stepped back and hit my heel against that blowpipe that was torn out and my foot slipped from under me, and that throwed the whole weight of the pipe right here (Indicating) on my knee and it mashed me right down under the pipe, and I sunk down."

Another witness described it thus: "They were putting up this blowpipe, and each section of this blowpipe was something like twelve feet long, and something like twenty-three or twenty-five inches in diameter. We had a rope tied here (Indicating) something like the center of the pipe, and the rope was attached to a block up at the top, and they used the rope to pull the blowpipe up. Two men were handling the rope. The two men were Mr. Chatman and myself. We was pulling on the rope, and Mr. Baxter was supposed to have guided the pipe to keep from knocking the flue holes as we pulled it up. As we pulled it up it kindly swung around and knocked Mr. Baxter down, and he said the full weight of the pipe went on his knee. . . . He had to go into a place where there was some old blowpipe, a post, and some boards that had been planed but had not been taken away and was laying on the floor, and he didn't have room enough to step around as the pipe swayed around."

The petition sets forth the ultimate facts above stated, the order of the foreman to plaintiff to go into

this place and do the work he did, and, "that owing to the rubbish and shavings and plank piled up about said joint of blowpipe, and owing to the way the pulley and rope was fastened to the said joint of blowpipe plaintiff was unable to hold the pipe without injury as aforesaid and in endeavoring to brace himself and hold said joint of pipe, and while exercising due care on his part, he fell in the manner and by the means aforesaid, thus and thereby permanently injuring his leg, knee-joint and kneecap, all caused by the carelessness and negligence of the defendant company, under the order and direction of its foreman, Bud Mead, in requiring plaintiff to lift or assist in raising said joint of blowpipe in the manner and by the means as aforesaid, and in not furnishing plaintiff with a reasonably safe place to do and perform his work, and reasonably safe tools and appliances with which to do and perform the same." As is proper on defendant's appeal, the facts are stated according to the evidence favorable to plaintiff.

The answer is a general denial, with special pleas:

(1) That plaintiff was already suffering from a stiff and diseased knee when he accepted employment from defendant and that his injury was within the assumed risk of, and incident to, his employment and physical condition; and (2) contributory negligence in that plaintiff voluntarily and carelessly placed himself in a position to cause his fall and injury complained of.

The errors complained of relate to (a) the refusal to sustain a demurrer to the evidence; (b) the giving of erroneous instructions; (c) the admission of improper evidence; and (d) that the verdict is excessive.

### OPINION.

STURGIS, J.—It is proper for us to remark that it materially aids the appellate courts for the parties

in their briefs to cite the Missouri cases in the official reports as well as by reference to the Southwestern Reporter when the cases cited are officially reported. This method of citation to the reporter system alone is not subject to objection in citing cases from other States. This is a growing tendency of attorneys and we make this observation generally rather than as applied to this particular case.

Appellant's first point is that the evidence shows that the injury was caused by the negligence of plaintiff's fellow servants in giving the rope a quick jerk and thereby suddenly and violently throwing the pipe against plaintiff, citing *Madden v. Mo. Pac. R. Co.*, 167 Mo. App. 143, 147, 151 S. W. 489; *Henson v. Pascola Stave Co.*, 151 Mo. App. 234, 243, 131 S. W. 931. That defendant in this kind of a case is not liable for an injury due solely to the negligence of a fellow servant is conceded, *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 297, 318, 91 S. W. 460, and we think defendant would have been entitled to an instruction submitting this question to the jury. There is much evidence, however, tending to show that the pulling of the rope was not unduly violent or sudden and we cannot hold as a matter of law that this was the sole proximate cause of the injury; in fact, the defendant's evidence tends to show that there was so little violence in the forward movement of the pipe that plaintiff merely "set down" instead of being knocked down or falling over the old pipe.

Defendant contends that it would be requiring more than ordinary care to have required it to make plaintiff's place of work more safe by removing the old pipe and debris or to adjust or fasten the block and tackle in a safer way, and that to do so violates the rule that the master has a right to do his work in his own way, provided it be done with reasonable care and safety. [*Dickinson v. Jenkins*, 144 Mo. App. 132, 136, 128 S. W. 280; *Sutherland v. Caretson-Creaseon*

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Lumber Co., 149 Mo. App. 338, 343, 130 S. W. 40.] We think, however, that under the evidence here the question is one for the jury as to whether, considering the manner of doing this work, the place where plaintiff was required to go to perform the same was reasonably safe and whether the master had exercised ordinary care in that regard.

Nor do we think this is a case falling within the exceptions to the rule of furnishing a safe place to work applicable to repair work in making safer an unsafe place, *Rowden v. Schoenherr-Walton Min. Co.*, 136 Mo. App. 376, 384, 117 S. W. 695, or to dangers temporary and inherent in the nature and progress of the work. [*Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 297, 318, 91 S. W. 460.] The work of installing this blowpipe had nothing to do with making safe the place where plaintiff was ordered to go in and do this work. That the given work or the place of doing it is temporary is a circumstance to be considered in determining what is reasonable care on the master's part in providing a reasonably safe place to work, but does not usually excuse him as a matter of law. The shortness of the time and ease with which the place of appliances can be made safer is also a fact to be considered and in this case makes a question for the jury.

As bearing on this point and that of assumption of risk and contributory negligence raised by appellant, it must be borne in mind that the plaintiff was working under the eye and in obedience to the direct and peremptory command of the master requiring quick obedience. In such cases, the servant has a right to rely on the superior knowledge of the master and to obey without careful inspection. He may assume that the master will not send him into a place of danger. [*Parsons v. Hammond Packing Co.*, 96 Mo. App. 372, 381, 70 S. W. 519; *Bradford v. Railroad*, 136 Mo. App. 705, 711, 119 S. W. 32; *Stephens v. Railway Co.*, 96 Mo. 207, 212, 9 S. W. 589; *Herdler v. Stove & Range*



Co., 136 Mo. 3, 17, 37 S. W. 115; Clark v. Iron & Foundry Co., 234 Mo. 436, 450, 137 S. W. 577.] We hold that this case was one for the jury.

What is designated as instruction number one, for plaintiff, is more in the nature of a preamble to the more specific instructions following it. It told the jury that it was defendant's duty to furnish plaintiff a reasonably safe place in which to work. Such general declarations of the master's duty are frequently given and then followed, as was the case here, by specific instructions applying this general principle to the particular facts of the case. [Overby v. Mears Min. Co., 144 Mo. App. 363, 374, 128 S. W. 813.] It is true, as asserted by appellant and conceded by the respondent, that the master's duty goes no further in this respect than to *use ordinary care* to furnish a reasonably safe place in which to work. [Bennett v. Crystal Carbonate Lime Co., 146 Mo. App. 565, 577, 124 S. W. 608; Bradley v. Railway Company, 138 Mo. 293, 307, 39 S. W. 763; McElhiney v. Friedman-Shelby Shoe Co., 158 Mo. App. 318, 328, 138 S. W. 60.] But, it is stated or intimated in each of these cases that such error in the abstract statement of the law is subject to criticism but is not generally reversible error if the other instructions correctly state the law as applied to the particular facts, and that the instructions must all be read together. Here, the next instruction, applying this principle to the facts of this case, tells the jury that they must find that plaintiff's injuries were caused by defendant's carelessness and negligence (the contrary of due care) in failing to furnish a reasonably safe place. An instruction given for appellant told the jury that defendant was not an insurer of plaintiff's safety and did not guarantee against his injury while working for it, but that a recovery must be based on defendant's negligence. We rule that the error does not call for a reversal.

Both parties to this case have given undue prominence to the question of assumed risk. There is little in this case indicating that this was a mere accident which could not have been foreseen or guarded against by ordinary care, or that it was due to any hidden defect or danger. It is a question of negligence on one hand and contributory negligence on the other. It is now so well settled as to need no citation of authorities that the servant does not assume risks arising from the master's negligence. [Brady v. Railroad, 206 Mo. 509, 528, 102 S. W. 978, 105 S. W. 1195.] The question of assumed risks of known danger and contributory negligence by going into the same are closely allied and often treated of by the courts as being the same. In the present case the court instructed the jury (numbered 4) that the employee does not assume the risks incident to the employment, unless such risks and dangers are so apparent that an ordinarily prudent man would not undertake the same; and, (numbered 5 and 6) that the verdict should be for plaintiff on the defense of assumption of risk in using a dangerous place to work at the master's directions, unless the danger was so obvious and glaring as to deter a man of ordinary prudence from so doing. This is more correctly the law as applied to contributory negligence based on this ground. [Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 322, 91 S. W. 460.] The courts, however, sometimes speak of this as assumption of risk. Thus, in Parsons v. Hammond Packing Co., 96 Mo. App. 372, 381, 70 S. W. 519, the court used this language: "The mere fact that the servant knows the defects may not charge him with contributory negligence or assumption of the risk growing out of them. . . . But if the defective appliance, although dangerous, is not of such a character that it may not be reasonably used by the exercise of skill and diligence, the servant does not assume the risk." [See, also, Bradford v. Railroad, 136 Mo. App. 705, 710, 119 S. W. 32.] The principles of

law declared by these instructions, criticised by appellant, are correct and the error is in designating the defense as assumption of risk instead of contributory negligence. Jurors are not likely, however, to be misled in this way, as they look to the general meaning of an instruction rather than to its analysis or the legal terms used. [Baker v. City of Independence, 93 Mo. App. 165, 170.] Besides, there was a correct instruction given for appellant on assumption of risk, telling the jury that plaintiff assumed the risks ordinarily incident to the work in question, and if he was injured by the dangers incident to the work to find for defendant. The plaintiff did not adopt the safest way in the trial of this case, when a safer one was open to him, in that he asked *too many* instructions on the question of assumed risk. Any negligence in that respect, however, will not be held as reversible error.

The defendant complains that the court admitted evidence that the defendant held liability insurance and that an insurance company would be ultimately liable for the verdict rendered. We find, however, that this evidence came in in an incidental manner and was promptly stricken out on objection being made. The court also permitted the plaintiff to show the amount of wages (one hundred dollars per month) the defendant's foreman was receiving, restricting this evidence to showing his interest in the case. The court, perhaps, went too far in this respect, as the fact of his being in defendant's employ was sufficient, but we think the error was harmless.

The defendant claims that the verdict, which was for \$2500, is excessive in view of plaintiff's age, earning capacity, and that any permanent injury to his knee is partially due to his previous rheumatism therein. But that was for the jury. A reading of the evidence has convinced us that the amount awarded is not so grossly excessive as to authorize the exercise of our limited right to require a remittitur. There is evi-

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State v. Bates.

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dence warranting the jury in finding that plaintiff's leg is permanently injured and its strength and usefulness greatly impaired. Other suggested errors have been noticed but do not warrant further discussion.

The judgment will be affirmed.

*Robertson, P. J., and Farrington, J., concur.*

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STATE OF MISSOURI, Respondent, v. S. A. BATES,  
Appellant.

Springfield Court of Appeals, December 31, 1914.

1. **INDICTMENTS AND INFORMATION: Intoxicating Liquors: Prescription of Physician: Sufficiency of Charge.** An indictment charging a physician with illegally issuing a prescription for liquor examined and considered to sufficiently charge that such liquor was not intended to be used for medicinal purposes.
2. **INTOXICATING LIQUORS: Prescription by Physician: Good Faith Examination.** Under Sec. 5784, R. S. 1909, it is incumbent on a physician who issues a prescription for liquor to ascertain in good faith that the liquor prescribed is a necessary remedy.
3. ———: ———: **Good Faith.** If a physician in good faith prescribes liquor for a patient as a necessary remedy he is not subject to punishment for error in judgment, nor because others of his profession differ from him in such conclusion. Nor is he liable although the patient, without the physician's knowledge, intends to use the liquor as a beverage.
4. **INTOXICATING LIQUORS: Prescription by Physician: Good Faith: Question for Jury.** In a prosecution against a physician for illegally issuing a prescription for liquor, evidence examined and reviewed and *held* that the question of the good faith of the physician in issuing the prescription was properly for the jury.

Appeal from Wayne County Circuit Court.—*Hon. E. M. Dearing, Judge.*

**AFFIRMED.**

*John H. Raney and Munger & Wise* for appellant.

(1) The count in the indictment under which defendant Bates was convicted states no offense under the law. *State v. Hume*, 141 Mo. App. 487. (2) Instruction numbered 1 falls far short of the necessary requirements of the statute in this, that it does not submit to the jury the question of whether or not Dr. Bates had knowledge that the whiskey and medicine prescribed by him was to be used for other than medicinal purposes. In fact there is no testimony in this case indicating that it was to be, or that it was in fact used for other than medicinal purposes. *State v. Pomeroy*, 163 Mo. App. 288.

*J. F. Meador* for respondent.

(1) The indictment is valid and sufficient, and concisely presents the charge. Section 5784, R. S. 1909; *State v. Manning*, 87 Mo. App. 78; *State v. Anthony*, 52 Mo. App. 507; re-affirmed and approved: *State v. Hume*, 141 Mo. App. 488. (2) Instructions must be read and construed as a whole. The true test, in determining the sufficiency of a charge, is to construe it as a whole and in relation to all its parts. It is not permissible to single out a single instruction and attack it merely because, standing alone, it may be unfavorable, or misleading. *State v. Weisman*, 141 S. W. 1108; *State v. Dunn*, 221 Mo. 530; *State v. Hall*, 228 Mo. 456; *State v. Montgomery*, 230 Mo. 660.

STURGIS, J.—The defendant in this case was prosecuted and convicted under an indictment returned by the grand jury of Wayne county, Missouri, for the offense of issuing a prescription as a physician for intoxicating liquors to be used otherwise than for medicinal purposes. The indictment is drawn under section

5784, Revised Statutes 1909, and charges "that on the 24th day of September, 1913, at Wayne county and State of Missouri, one S. A. Bates, being then and there a physician and engaged in the practice of medicine, did then and there unlawfully make out and issue to one Jasper Markham a prescription for intoxicating liquor, and for a compound of which intoxicating liquor formed a part, to be used otherwise than medicinal purposes; which said prescription is as follows." The prescription is then set out in full and the indictment ends with the words: "Against the peace and dignity of the State." A trial was had to a jury, who returned a verdict finding the defendant guilty and assessing his punishment at a fine of one hundred dollars.

The defendant challenges the sufficiency of the indictment, citing the case of *State v. Hume*, 141 Mo. App. 487, 124 S. W. 1099. This indictment, however, is not subject to the defect pointed out in the indictment in that case. It is there said that the indictment does not negative the innocence of the defendant and does not connect the defendant with a knowledge of the purpose that the prescription issued by him was to be used for other than medicinal purposes; but it is said that if an indictment should charge that a physician issued a prescription for intoxicating liquors to be used as a beverage, it would be sufficient as this would negative its being used for medicinal purposes. The present indictment is in the language of the statute and is in the form approved in *State v. Anthony*, 52 Mo. App. 507. [See, also, *State v. Pomeroy*, 163 Mo. App. 288, 147 S. W. 144.]

The evidence in this case shows that the prosecuting witness, Markham, applied to the defendant at his office in Piedmont, Missouri, for a prescription for Whisky. There was a county fair going on at this town at this time. This witness and several companions were attending the fair and had been drinking more or less during the day. He applied to the de-

defendant for the prescription along in the evening and the evidence is conflicting as to the extent of his intoxication at that time. The witness said that he was and had been for sometime suffering with some ailment causing pains in his back which he attributed to kidney trouble. The evidence is conflicting as to the extent of the examination made by the defendant to ascertain the condition of the patient and the cause of his malady. According to the evidence of the prosecuting witness he had already made up his mind both as to the nature of his trouble and the proper remedy therefor, and he says he not only asked for a prescription for whisky but insisted that it should be good whisky. He also seems to have indicated to the defendant the quantity of whisky necessary for his particular case, to-wit, a quart, and this is the amount which the prescription called for. The prescription was immediately filled at the drug store where the defendant kept his office. In explanation of his having prescribed whisky for his own ailment, the prosecuting witness said that he had been using this remedy for sometime and that it had been prescribed for him by another person who his evidence would at first indicate was another doctor. On cross-examination, however, he admitted that the person who had previously prescribed whisky as a proper remedy for his ailment was a man whose occupation was that of a day laborer on a railroad. The defendant testified that he made an extensive examination of the prosecuting witness and that he had kidney trouble, which, in his judgment, would be helped by the use of a stimulant and that he prescribed whisky as a proper remedy in good faith. He says that the whisky was not to be used alone, but that it was to be used merely as a preservative of certain herbs, such as burdock root, yellow dock, sassafras and May apple root, which he directed the patient to put in the same in order to make "bitters." He excuses himself for not having prescribed these

herbs in the prescription on the ground that they were not kept in stock by the druggist and that the patient could readily dig and find the same in his back yard or field. There was evidence of other physicians to the effect that alcoholic stimulants generally acted as irritants to the kidneys and were apt to aggravate rather than cure the ailments such as the prosecuting witness had described. These witnesses also testified that while whisky is a tonic and might afford temporary relief in certain kidney trouble, yet, they knew of no such trouble as would require a quart of this stimulant. It is shown also that the defendant, for some cause, cautioned the patient not to use the whisky in excess as it would make his blood flow too fast. It seems that the patient was so unfortunate as to lose the entire quart of whisky by breakage a short time after he received it and the record does not show whether he would have used it as a medicine or as a beverage and its efficiency as a remedy was not put to the test.

It will be noticed that the sale of intoxicating liquors on a physician's prescription for medicinal purposes and the issuance of prescriptions by physicians calling for intoxicating liquors are restricted by our statutes within narrow limits. While alcohol and intoxicating liquors are recognized by our statutes as having medicinal value and the sale and use of same as medicine is permitted, yet, it is evident that the Legislature has restricted both druggists and physicians to dispensing the same as medicine only. Section 5781, Revised Statutes 1909, prohibits druggists from selling or dispensing such liquors except on a physician's written prescription designating the person for whom the same is prescribed and "that such intoxicating liquor is prescribed as a necessary remedy." This means that the intoxicating liquor prescribed is to be used by a particular person as a *remedy* and that it is in the judgment of a physician a *necessary* one. Section



5784, Revised Statutes 1909, prohibits any physician from issuing to any person a prescription for intoxicating liquors, or for any compound of which such liquors shall form a part, to be used otherwise than for medicinal purposes. The physician issuing such a prescription must state therein that the intoxicant is a necessary remedy and the law casts on him the duty of ascertaining in good faith that same is such necessary remedy. The physician cannot cast on the patient, suffering from some real or imaginary ailment, the privilege of diagnosing his own case and prescribing the proper remedy. The evidence shows that such patients often want the thing that has caused the ailment rather than one to cure it. If the patient knows both the cause and nature of his malady and the "necessary remedy" therefor, he has little need to consult a physician. If the physician acts in good faith in prescribing intoxicating liquors as a medicine, he is not to be punished for an error of judgment; nor because another physician differs with him as to its being a necessary remedy; nor is he liable in case the patient, without his knowledge, intends to use the liquors thus obtained as a mere beverage or for a purpose other than medicinal and he cannot be convicted merely because the patient thereafter does so. [State v. Pomeroy, 163 Mo. App. 288, 292, 147 S. W. 144.]

We think, as did the trial judge, that the evidence in this case warranted the submission to the jury of the question of the good faith of the defendant in issuing this prescription. According to the defendant's evidence, he issued the prescription in good faith; but there is evidence to the contrary and the question was one for the jury.

On behalf of the State, the court instructed the jury that if the defendant, as a physician, "made out and issued to the witness, Jasper Markham, a prescription for intoxicating liquor, to-wit, whisky, or for a compound of which any intoxicating liquor formed a

part, to be used otherwise than for medical purposes, that is to say, to be used otherwise than for the necessary treatment of the ailment with which the person to whom such prescription was made out and issued was suffering at the time; then you will find the defendant guilty." For the defendant, the court instructed the jury that "if you find from the evidence that the defendant made a physical examination of the witness Jasper Markham, for the purpose of determining what kind of medicine he should prescribe for him, and if you shall believe that upon such examination he honestly believed that the prescription made by him for said witness, consisting of whisky and other ingredients was best calculated to meet the immediate case of said witness and a necessary remedy, and that said prescription was not made in an attempt to evade the law, then your verdict should be for the defendant." These instructions fairly and in a manner easily to be understood by the jury declared the law applicable to the case and submitted defendant's good faith and purpose in issuing the prescription and are to be commended for their clearness.

Finding no error in the record, the judgment will be affirmed.

*Robertson, P. J., and Farrington, J., concur.*

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CAMPBELL LUMBER COMPANY, Appellant, v.  
LEVEE DISTRICT NO. 4, J. J. CLENNY et al.,  
Respondents.

Springfield Court of Appeals, December 31, 1914.

1. **LEVEES: Organization of Levee District: Collateral Attack Upon.** One who is not a taxpayer in a levee district cannot attack the legality of the organization thereof or its corporate existence in a purely collateral action.

## Lumber Co. v. Levee District.

2. ———: ———: Notice: Collateral Attack. That notice was not given under Sec. 5728, R. S. 1909, of the landowner's meeting to vote on the doing of the work connected with the establishment of a levee is not ground for collateral attack upon the corporate existence of a levee district organized under Sec. 5714, R. S. 1909.
3. ———: Organization of Levee District: Public Corporations: For Public Welfare: Courts Reluctant to Interfere With. Drainage districts are public corporations authorized by law to prevent the overflowing of land. They are organized partly at least under the police power of the State and to promote public welfare and must be given some discretion as to the methods employed to accomplish their work and the courts are loath to interfere with such methods.
4. DAMAGES: Public Improvements: Damnum Absque Injuria. In effecting public improvements, damages often follow which are remote and consequential. The courts regard them as *damnum absque injuria*.
5. LEVEES: Levee Districts: Injunction to Compel Connection. Plaintiff owned lands which lay in an upper levee district, organized after defendant levee district. He was not entitled by injunction to compel defendant district to connect its levee with that of the upper district.

Appeal from Pemiscot County Circuit Court.—*Hon. Frank Kelly*, Judge.

**AFFIRMED.**

*T. R. R. Ely* and *Virgil McKay* for appellant.

(1) The evidence in this case shows that district number 4 was not organized according to law and therefore has no authority or power to proceed with the construction of its levee and ditch. R. S. 1899, sections 8443-4; *Harris v. Co.*, 49 Cal. 662; *Walker v. Dist.*, 6 Mackey, 352; *Hinkel v. Mattoon*, 170 Ill. 316; *Brophy v. Laudman*, 28 Ohio St. 542; *Cuming v. Grand Rapids*, 9 N. W. 141. (2) Injunction is the proper remedy in cases like this. R. S. 1909, sec. 2534; *Fitzpatrick v. Milk*, 24 Mo. App. 435; *Harber v. Evans*, 101 Mo. 661; *Hayden v. Tucker*, 37 Mo. 215; *Paddock v. Somes*,

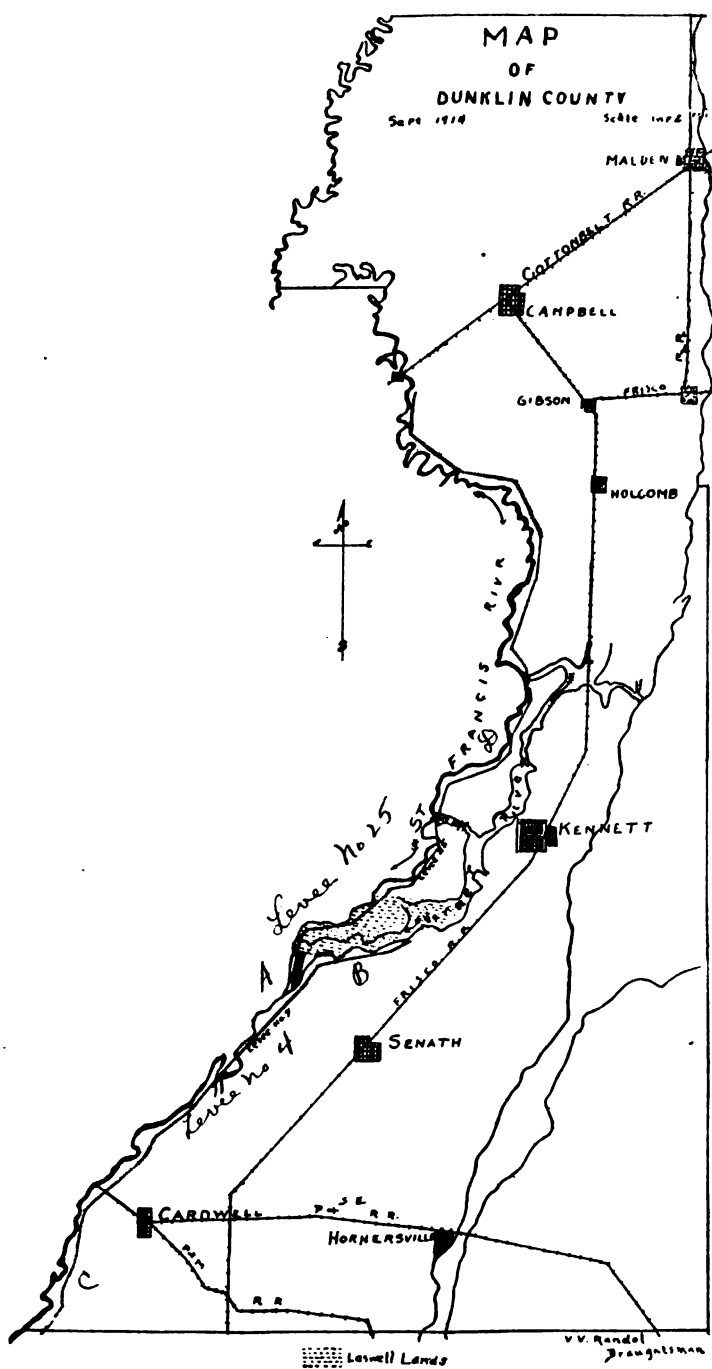
102 Mo. 226; *Bank v. Kennett*, 101 Mo. App. 370; *Keigwin v. Coms*, 115 Ill. 347; *Springer v. Walters*, 139 Ill. 419; *Woodruff v. Fisher*, 17 Barb. 224; *Caufield v. Smith*, 34 Wis. 381. (3) Where public officers are proceeding illegally under claim of right, they may be enjoined. *Touzalin v. Omaha*, 25 Neb. 817; *Johnson v. Hahn*, 4 Neb. 139; *Belknap v. Belknap*, 2 Johnson Ch. 472; *Livingston v. Livingston*, 10 Am. Dec. 353.

*Ward & Collins and George A. Burr* for respondents.

(1) Levee district number 4 is a municipal corporation and its organization cannot be collaterally assailed nor even inquired into at the suit of an individual. *Barnes v. Missouri Valley Const. Co.*, 165 S. W. 723; *State ex rel. Coleman v. Blair*, 245 Mo. 680; *State v. Fuller*, 96 Mo. 165; *Catholic Church v. Tobbein*, 82 Mo. 418; *Burnham v. Rogers*, 167 Mo. 17; *School District v. Hodgins*, 180 Mo. 70-78. (2) Levee district number 4 cannot be held liable either in damages or injunction, for the legal and proper exercise of a power conferred by law, even though individuals may sustain injuries thereby, unless made so by statute. *The Northern Transportation Co. of Ohio v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; 20 Am. & Eng. Ency. (2 Ed.), 1192; *Funke v. St. Louis*, 122 Mo. 132. (3) The landholders' notice cannot be attacked collaterally. *State v. Coles*, 151 S. W. 195; *State v. Blair*, 245 Mo. 680. (4) Due and legal notice of landholders' meeting was given. All landholders were present in person or by proxy and participated in the election. *State v. Taylor*, 224 Mo. 393.

**STATEMENT:** This is a suit to restrain the defendant, levee district, from constructing a levee along the east bank of the St. Francis river in the south part of Dunklin county, Missouri, in the manner and at the

location fixed in organizing such district. The defendant district is organized under the provisions of article 10, of chapter 41, Revised Statutes 1909, being sections 5714 to 5763. The levee being constructed by the defendant was located in the manner provided by said article. Plaintiff's claim is that the construction of the levee, and particularly the upper or northern portion thereof, will cause its lands to be overflowed and inundated. Plaintiff's lands are not in levee district number 4 but are in levee district number 25, the levee of which is also being constructed along the east bank of St. Francis river in said county but further north and upstream from district number 4. Levee district number 25 is the next levee district upstream from levee district number 4. The river runs substantially north and south. The accompanying plat will show the location of plaintiff's lands with reference to the St. Francis river and the two proposed levees, number 4 and number 25. The levees are marked by broken lines and plaintiff's land is shaded and called "Laswell lands" because of a former owner. Levee number 25 extends from "D" to "A." Levee number 4 extends from "B" to "C."



It will be seen from this plat that plaintiff's lands, 3800 acres, lie in the low bottoms of Varner and St. Francis rivers where the same join and these lands are subject to almost constant overflow in the absence of any levee. Varner river is more in the nature of a slough or bayou and is mostly formed by overflow water from the St. Francis river. Levee number 25 is being built across the source of Varner river or bayou where it leaves the St. Francis river and will dam up such source. It will be noticed that levee number 4 does not cross the mouth of Varner river near point "A," but leaves St. Francis river and follows the east bank of Varner river a distance of four or five miles. Levee district number 4 was established some two years before levee district number 25 and its levee was not, therefore, located with a view to connecting with levee number 25, which was not yet proposed, but was so constructed to prevent the waters of Varner river, as well as of the St. Francis river, from overflowing the lands in district number 4. In locating the levee of number 25, it crosses a large part of the wide low bottoms made at the mouth of Varner river but does not extend far enough to connect with levee number 4, or to prevent the backwaters from the St. Francis river overflowing the lowlands of plaintiff. There is a space of about one thousand feet at point "A" on the plat, shown by the heavy black line, which is not closed by either levee. What plaintiff really wants is to compel the defendant to so change its levee as to follow St. Francis river as shown by the heavy black line and to thus close up this vacant space instead of deflecting the same up the east bank of Varner river.

### OPINION.

STURGIS, J.—The plaintiff, although alleging that the defendant "is a body corporate organized and existing under and by virtue of the laws of the State

of Missouri," attacks its corporate existence and right to construct this levee because it was not "organized according to law." The specific objection is that the notice required by section 5728, Revised Statutes 1909, in calling a meeting of the landowners to vote on the question of doing the work according to the plans and estimates made by the engineer and assessor was not published as required by that section. From a reading of the method of organizing such corporations by the county courts, it appears to us that the corporate existence of the defendant is in nowise dependent on the regularity of this notice or the method of voting or conducting this meeting. The corporation was already formed before this landowners meeting was called and was merely exercising its corporate powers in calling and holding such meeting. The failure to give notice required might affect the power of the corporation to levy and collect the taxes from the landowners in the district and such question might be raised in a suit to collect such taxes, or even to enjoin the doing of the work, by an interested landowner; but that is not before us for decision. We do hold, however, that one who is not a taxpayer in the defendant district cannot attack the legality of its organization or its corporate existence in this purely collateral action. In a suit to collect drainage taxes, the court, in *State ex rel. v. Blair*, 245 Mo. 680, 687, 151 S. W. 148, held that a collateral attack could not thus be made on the organization or corporate existence of a similar corporation formed under article 4, of chapter 41, Revised Statutes 1909, by alleging the unconstitutionality of section 5581, Revised Statutes 1909, or the failure to give the notice thereby required and said: "Defendant also asserts that the notice issued under said last-named section was irregular and insufficient in both form and substance. Neither of the issues thus tendered can avail defendant in this action, because a drainage district is a public corporation, and the legal-



ity of its organization and the sufficiency of its corporate existence cannot be inquired into in this collateral action. [State v. Fuller, 96 Mo. 165; Catholic Church v. Tobbein, 82 Mo. 418; Burnham v. Rogers, 167 Mo. 17; School District v. Hodgin, 180 Mo. 70.]” The notice there spoken of, however, is a notice similar to that required by section 5716, Revised Statutes 1909, of the chapter now in question, and relates to the formation of the corporation, which the notice required by section 5728, Revised Statutes 1909, does not. It is generally held that the legality of the organization of a public corporation cannot be collaterally assailed. [Barnes v. Missouri Valley Const. Co., 257 Mo. 175, 165 S. W. 723, 726, and cases there cited.] That these levee districts are public corporations is declared by statute, section 5714, Revised Statutes 1909. [State ex rel. v. Taylor, 224 Mo. 393, 469, 123 S. W. 892.] We need not, therefore, inquire further as to the sufficiency of the publication of the notice in question, although we think its publication was sufficient. And, it is also shown to be true in this case, as stated in State ex rel. v. Taylor, *supra*, that “this record shows that all of them (landowners) were actually in court in some form or other and participated at one stage or another in the proceedings.”

A few observations will suffice to justify the action of the trial judge in refusing to grant this injunction. A study of the physical facts disclosed by the plat will demonstrate this. The only relief at all justifiable would be to restrain the defendant from constructing that part of the levee deflecting along the Varner river above point “A.” That would not close up the gap between the two levees and we do not see how plaintiff would be much, if any, benefited. The court was not asked to compel the defendant to close up this gap by building its levee along the St. Francis river to connect with that of levee number 25. It would seem that if either district could be compelled to do this, a

point we do not decide, then, as district number 4 was the first to organize and locate its levee, number 25 is more properly the one which ought to do this. It is also shown that these two districts have adopted different methods of constructing levees, one of them making the embankment on the land side and the other on the river side of the excavation. There is no evidence as to which is the better. Defendant claims in argument that its method is far superior, but the point is that the two levees when constructed in these different manners cannot be joined without completely obstructing the excavated ditch carrying a large amount of surface and overflow water and causing same to be dumped on plaintiff's and other lands. Again, we think that other things being equal, the district last organized, if either, should be made to conform to the prior one in the method of constructing the levee.

It is conceded that plaintiff's lands are swampy and largely covered with water in the absence of any levee. It is uncertain to what extent the building of both these levees, as proposed, will aggravate this evil. As plaintiff's witness said, it does not make much difference whether the land is "six inches wet or six feet." It is shown, that because levees are built on the Arkansas side of the St. Francis river also, the effect is to confine the waters to a channel and this raises the same two or three feet in high water. This would cause the waters to back up through the break in the levees to a greater extent. But, it is a matter of grave doubt as to what effect defendant's levee has on this condition. The gathering together of the waters and casting same into this opening and onto plaintiff's flat lowlands in greater volumes is due to levee number 25. Perhaps that part of defendant's levee along the Varner river aggravates this condition by not allowing the waters to spread out more, but it could do but

little damage in this respect without levee number 25 being built.

Plaintiff bought this land after levee number 4 was located, but we have not given this fact much weight. Water must run somewhere and one who buys lands which are practically the bed of an overflow river cannot always demand that in draining lands more favorably situated the drainage system should be so constructed as to drain his lands equally with others more favorably situated. These drainage districts being public corporations, authorized by law to do this character of work and formed partly at least under the police power of the State and to promote the public welfare, must be given some discretion at least as to the method employed to accomplish their work. The courts go slow in administering their affairs or controlling the methods adopted in doing their work. What rights plaintiff may have in another action we do not say. There is a class of remote and consequential damages to property flowing from making public improvements which are regarded as *damnum absque injuria*. [Funke v. St. Louis, 122 Mo. 132, 26 S. W. 1034; Vam De Vere v. Kansas City, 107 Mo. 83, 17 S. W. 695; Northern Trans. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336; 20 Am. & Eng. Ency. of Law (2 Ed.), 1192, 1193.] It is sufficient in this case to hold that the injunction asked should not be granted.

The judgment of the trial court will, therefore, be affirmed.

Robertson, P. J., and Farrington, J., concur.

CHARLES B. WINSTON, Respondent, v. JAMES W. LUSK, W. C. NIXON, and W. B. BIDDLE, RECEIVERS OF THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellants.

Springfield Court of Appeals, December 31, 1914.

1. **CARRIERS: Passenger: When Relation Begins.** Plaintiff having purchased a ticket presented himself at the steps of the defendant's coach to board the train, exhibiting his ticket. The brakeman denied his right to enter and assaulted him. Plaintiff held a passenger.
2. ———: **Assault on Passenger: Conflicting Evidence: For Jury.** Where there is a conflict of evidence whether the brakeman or the plaintiff passenger was the aggressor in an assault alleged to have been committed by the brakeman upon the passenger, the question was properly submitted to the jury.
3. **INSTRUCTIONS: Curing Omission by Other Instructions: Carriers: Assault.** In an action by a passenger for personal injuries because of an assault by defendant's brakeman, an instruction was given to find for plaintiff if he, under the circumstances mentioned, while attempting to board the car, was struck by the brakeman, and such striking was unjustifiable. The instruction is not erroneous because it failed to state the facts constituting justification, where they are stated in an instruction given for defendant.
4. **CARRIERS: Duty to Passengers: Insurers Against Assault by Employees.** A carrier is liable absolutely as an insurer for the protection of its passengers against assaults and insults at the hands of its servants.
5. ———: **Assault on Passenger by Brakeman: What Not a Defense.** That a brakeman assaulted a passenger, deliberately and without provocation, and merely to feed his personal grudge, does not excuse the carrier from liability on the ground that the brakeman was not acting within the scope of his duty.
6. **INSTRUCTIONS: Request That They be Made More Explicit: When Necessary.** An instruction as to damages held correct, though general in its scope. The defendant should, if he desired, have asked for more definite and explicit instructions pointing out the proper element of damages and excluding any improper element.

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Winston v. Lusk.

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7. ———: Harmless Error. An error in an instruction in not limiting the amount of actual damages to the amount sued for, is rendered harmless by the fact that the jury entered a verdict for a much less amount.
8. DAMAGES: Discretion Allowed Jury. Large discretion is allowed a jury in awarding damages for personal injuries.
9. ———: Assault: Jury May Consider What. In an action by a passenger for damages because of an assault at the hands of a railroad brakeman, it is proper for the jury to consider that the assault was made at a public place, also the wounded feelings, humiliation and disgrace of the plaintiff as elements of actual damages in addition to his bodily injuries.
10. APPEAL AND ERROR: Assault on Passenger: Punitive Damages: Not Excessive When. Where an assault by a brakeman upon a passenger was wholly unwarranted and made merely for revenge, an award of \$700 punitive damages is considered not excessive.

Appeal from Dunklin County Circuit Court.—*Hon. W. S. C. Walker*, Judge.

**AFFIRMED.**

*W. F. Evans, Moses Whybark and A. P. Stewart* for appellants.

(1) Plaintiff was the aggressor in the first fight on the depot platform, and the demurrer to the evidence under the first count of the petition should have been sustained. *O'Brien v. Transit Co.*, 185 Mo. 269; *McQuerry v. Railroad*, 117 Mo. App. 255; *Eads v. Railroad*, 43 Mo. App. 536; *Breen v. Transit Co.*, 108 Mo. App. 452. (2) The court erred in giving instruction number 1 for plaintiff as it fails to tell the jury what would constitute a justification for the alleged assault on plaintiff, and the jury were left to determine this question of law without any guidance by the court. *Jordan v. Moulding Co.*, 72 Mo. App. 328. (3) The demurrer to the evidence under the second count of the petition should have been sustained. The difficulty between plaintiff and the brakeman on the train was

personal, and in furtherance of a personal grudge on the part of the brakeman, and in committing said assault the brakeman was not acting within the scope of his employment, and in the line of his duty, and his act did not pertain to the particular duties of his employment. *Hartman v. Muehlbach*, 64 Mo. App. 565; *Collette v. Rebori*, 107 Mo. App. 711; *McPeak v. Railroad*, 128 Mo. 617; *Faber v. Railroad*, 116 Mo. 81; *Raming v. Railroad*, 157 Mo. 477; *Drolshagan v. Railroad*, 186 Mo. 258; *Milton v. Railroad*, 193 Mo. 46. (4) Instruction number 3 given for plaintiff under the second count of the petition is erroneous because it attempts to authorize the assessment of both compensatory damages and punitive damages, and does not limit the compensatory damages to the amount sued for in the petition. *Spohn v. Railroad*, 116 Mo. 633.

*Bradley & McKay* and *Fort & Zimmerman* for respondent.

(1) Respondent was not the aggressor in the first assault. *State v. Harden*, (S. C.) 2 Speers, 152-3; *State v. Smith*, 80 Mo. 516. (2) It is a well-established rule of law in this State that carriers must treat their passengers with respect, and must endeavor to protect them from injury or insult, not only from their employees, but from strangers and fellow passengers. *Spohn v. Railroad*, 87 Mo. 74; *Eads v. Railroad*, 43 Mo. App. 536; *McQuerry v. Railroad*, 117 Mo. App. 255. (3) The court will not reverse a case on an improper instruction unless the same is so misleading as to constitute prejudicial error, and affect substantial justice. The instructions should be taken as a whole and considered together the ones given for plaintiff and those given for defendant, and it is to be presumed that the jury did their duty and considered the instructions together. *Sonnen v. Transit Co.*, 102 Mo. App. 274-276; *Pendergrass v. Frisco*, 162 S. W. 717;

Reams v. Jones D. G. Co., 99 Mo. App. 403; Benjamin v. Railroad, 133 Mo. 274; Robinson v. St. Joseph, 97 Mo. App. 503; Eckle v. Ryland, 165 S. W. 1035; McElhiney v. Shoe Co., 158 Mo. App. 318. (4) Respondent was a passenger when he purchased a ticket and was at the station for the purpose of entering one of appellant's cars. Berry v. Railroad, 124 Mo. 223; Schepers v. Union Depot R. Co., 126 Mo. 665; Railroad v. Franklin, 44 S. W. 701.

STURGIS, J.—This is a suit for personal injuries inflicted on plaintiff growing out of assaults on him by defendants' brakeman while the relation of carrier and passenger existed between plaintiff and the railroad company being operated by defendants as receivers. The petition is in two counts, covering separate assaults by the same employee of the defendants, the first occurring while plaintiff was attempting to board one of defendants' passenger trains at Kennett, Missouri, and the other about fifteen to twenty minutes later while the plaintiff was riding as a passenger on the same train.

The plaintiff, whose place of business was at Kennett, Missouri, purchased a ticket there one Sunday morning in order to go to Holcomb, Missouri, a few miles distant, to visit his mother. When the passenger train stopped and the passengers getting off there had alighted, the plaintiff, with other passengers, started to board the train. Defendants had a rule requiring all intended passengers to exhibit their tickets before boarding the cars. The defendants' brakeman assisted those getting off and took his position at the foot of the steps leading up to the passenger coach to enforce this rule and look after the loading of the passengers. Some three or four young ladies passed up the steps just ahead of the plaintiff and the brakeman says that one of them being without a ticket designated the plaintiff as having her ticket and he al-

lowed her to pass on. The plaintiff denied that he was accompanying or even knew this young lady or had any knowledge of her being allowed to enter the car on her representation that he had her ticket. He exhibited his ticket to the brakeman and started to ascend the steps. Here the evidence diverges. The plaintiff says the brakeman, without any explanation whatever other than to say "you are not going to ride on that," meaning the ticket exhibited, jerked him off the steps to the ground, causing him to drop his overcoat and umbrella and further assaulted him, which he resented, ending in a fight until the two were separated. The brakeman says that he told plaintiff that two could not ride on his one ticket and that he had allowed a lady to pass on that ticket and refused to allow plaintiff to go up the steps without another ticket; that he used no more force than to pull plaintiff back and bar his way up the steps; that plaintiff became angered and struck him in the face, whereupon they clinched and scuffled until separated. The brakeman denies striking the plaintiff at this time. After this difficulty was over the plaintiff had a few scratches about his face and neck and one of his little fingers was severely injured, but this latter injury was caused by plaintiff's fist coming in violent contact with the brakeman's face, causing his nose to bleed freely. The plaintiff was found to have blood on his hands and clothes, but this also largely came from the brakeman's nose. The plaintiff's evidence, however, was that after he was jerked to the ground and lost his overcoat and umbrella the brakeman got between him and the steps and struck at him, either with his hand or fist, and "scratched him in the eye" and not until then did plaintiff strike the brakeman.

If plaintiff's version of the affair is correct, and the jury has so found, then the brakeman was to blame in every way, as he not only wrongfully prevented



plaintiff from entering the car but pulled him back rudely and with unnecessary violence and assaulted him after he was down on the platform. The plaintiff's striking the brakeman was in self-defense and in protection of his rights as a passenger, for the relation of carrier and passenger then existed though the plaintiff had not yet entered the car but was only trying to do so. [Bledsoe v. Railroad, decided at this term, and cases cited. See also Schepers v. Union Depot R. Co., 125 Mo. 665, 673, 29 S. W. 712.] In such case it is but fair to hold the defendants responsible for all the injuries suffered by plaintiff, even to the injury to his finger resulting from his striking the brakeman, though the instructions given by the trial court hardly went that far.

On this branch of the case the court instructed the jury that if the plaintiff had purchased his ticket entitling him to transportation and that "while attempting to board said train in the usual and ordinary manner, he was struck on the head, arms, breast or body by an agent and employee of the defendants, and that such striking, if you find such to be a fact from the evidence, was not justifiable, and you further find that he was injured by said assault, then your verdict will be for the plaintiff." For the defendants, the court instructed that if "before plaintiff had boarded said train, the plaintiff and defendants' brakeman engaged in a controversy as a result of a mistake on the part of said brakeman as to plaintiff's right to board said train, and during such controversy the plaintiff struck the brakeman, then you are instructed that said brakeman had the right to defend himself, and to use such force as was reasonably necessary to repel plaintiff's assault, and if you further find that said brakeman used no more force than was reasonably necessary for that purpose, then plaintiff cannot recover on the first count in his petition, but your verdict should be for the defendants on said first count."

The first count of the petition alleges that this assault was wanton and malignant and asks for punitive damages but the court directed the jury not to award any punitive damages. Under these instructions the jury returned a verdict under this count for \$250 actual damages.

The defendants' first point is that the plaintiff was the aggressor and that, notwithstanding the defendants' duty to plaintiff as a passenger, the brakeman had a right to defend himself from plaintiff's assault and that a demurrer should have been sustained to this count on the authority of *O'Brien v. Transit Co.*, 185 Mo. 263, 269, 84 S. W. 939, and *Breen v. Transit Co.*, 108 Mo. App. 443, 451, 83 S. W. 998. There is substantial evidence, however, that the brakeman was the aggressor in this assault, as well as being in the wrong in attempting to prevent plaintiff from going into the car, and the court did right in submitting the question to the jury as it did in both of the cases just cited.

Plaintiff's instruction, above mentioned, is criticised as submitting to the jury a mixed question of law and fact, whether the brakeman's assault on plaintiff was *justifiable* and that the jury should have been told what facts would constitute a justification. An instruction similar to this, and equally as objectionable in this respect, was held not to constitute error in *Sonnen v. Transit Co.*, 102 Mo. App. 271, 274, 76 S. W. 691. We approve what the court there said. "Two opposing theories of the assault are presented by the pleadings and the evidence; the plaintiff's, that an unprovoked assault was made upon him, the defendant's, that the assault was justified. It was the duty of each party to the suit to take care of his own side of the case and to offer instructions covering his theory of the case as set out in his pleadings and sustained by his evidence. The instruction under review comprehends very fully all the facts which plaintiff relied on and which entitle him to the verdict, and is supported

by the evidence offered by him, therefore it was appropriate." In this case, as in that one, the jury were told in an appropriate instruction given for defendant, as above mentioned, what facts in evidence constitutes a justification of the brakeman's assault on plaintiff. Both theories of the case were properly presented to the jury. The defendants' real grievance arises from the fact that the jury did not believe their version of the affair.

The defendants do not attempt to justify the second assault made by this brakeman on the plaintiff. It occurred on the train and in what is termed the ladies' coach some fifteen minutes after the first assault. After the first difficulty with plaintiff, the conductor interfered and sent the brakeman to do some other work and permitted plaintiff to enter the passenger coach. The plaintiff, after washing off the blood from the first encounter, took a seat with a friend therein and the train proceeded on its way. The tickets were taken up by the conductor and it is significant that no young lady was found therein without a ticket. This brakeman, though admonished by the conductor not to have any further difficulty, deliberately hunted up the plaintiff for the avowed purpose of "whipping him if he could." He seems to have been smarting because of the unsatisfactory termination of the first difficulty and made up his mind, as he expressed it, that no man "could hit him on the nose and get away with it." When he located plaintiff on the seat in the passenger coach, he asked him if he was the man who hit him at the steps and on plaintiff answering in the affirmative again assaulted him and, as he says, hit him full in the face. Plaintiff says, however, that he dodged this blow and that it did not injure him as seriously as was intended. These parties had to be again separated to end this fight. There is no doubt that this second assault was deliberate, unprovoked and for revenge. The defendants' only attempt at a justifica-

tion for this assault is that it was personal to the brakeman, in furtherance of a personal grudge on his part and in committing this assault the brakeman was not acting within the scope of his duty. We cannot better answer this contention than by quoting from *O'Brien v. Transit Co.*, 185 Mo. 263, 268-9, 84 S. W. 939, as follows: "While the passenger is in the carrier's vehicle he is entitled to protection from assault even from strangers, if by the exercise of the degree of care devolving on the carrier it can be afforded, and *a fortiori* the carrier owes it to his passenger not to maltreat him by the hands of its own servants. [Hutchinson on Carriers, secs. 595-6.] Quoting again from 3 Thompson on Negligence, secs. 3185, 3186, the author says that the law implies not only an agreement to carry safely, 'but also an agreement for kind, considerate, respectful and decorous treatment to the passenger at the hands of the carrier's own servants. . . . The carrier is liable absolutely, *as an insurer*, for the protection of the passenger against assaults and insults at the hands of his own servants, because he contracts to carry the passenger safely and to give him decent treatment *en route*.' . . . If a stranger on the car had done to this man what the evidence for plaintiff tends to show the conductor (brakeman) did, and if the conductor (brakeman) could have prevented the wrong by the exercise of a very high degree of care and failed to do so, the defendant would have been liable; with what stronger reason, therefore, is the defendant liable when the conductor (brakeman) himself is the offender." And, in *Eads v. Met. St. Ry. Co.*, 43 Mo. App. 536, 545, this language is used: "The carrier is responsible for the malicious and wanton acts of the servant to a passenger whether done in the line of his employment or service or not, if done during the course of the discharge of his duty to the master which relates to the passenger. For he owes him, as before stated, not only carriage, but protection also, and if he

furnishes a servant who, instead of protecting, insults or assaults, or beats the passenger, he has directly failed of his duty to the passenger." [See also *Spohn v. Railroad*, 87 Mo. 74, and 116 Mo. 617, 632, 22 S. W. 690.]

The plaintiff's instructions are also criticised as being misleading on the measure of damages. The instructions covering plaintiff's case on each count, and authorizing a recovery on the facts hypothesized, wind up by saying, "and you should assess his damages at such sum as in your judgment will compensate him for the injuries so received, if any, by virtue of said assault not to exceed the sum of \$2000, the amount sued for. These instructions are not erroneous in their general scope and are such as have often been held sufficient on plaintiff's part and leave to the defendant the privilege and duty, if he desires to do so, to ask more definite and explicit instructions pointing out the proper elements of damages and excluding any improper element. [Smith v. Fordyce, 190 Mo. 1, 30, 88 S. W. 679; Strayer v. Railroad, 170 Mo. App. 514, 529, 156 S. W. 732; Powell v. Union Pac. R. Co., 255 Mo. 420, 164 S. W. 628.] Plaintiff's third instruction is likewise general as to the actual damages, and, without limiting the amount to that sued for, then predicates the elements of wantonness and wilfulness authorizing an award of punitive damages. The error in this instruction in not limiting the amount of actual damages to the amount sued for is rendered harmless by the fact that the jury rendered a verdict for a much less amount, to-wit, \$250.

We have also considered the question of excessive actual damages on each count, but, considering the fact that the jury must be given a large discretion in awarding damages for personal injuries and that these successive assaults were made at a public place and that the jury properly considered plaintiff's wounded feelings, humiliation and disgrace as elements of actual

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damages in addition to his bodily injuries, we cannot say that the same are grossly excessive. The second assault, for which alone punitive damages were awarded, was so peculiarly unwarranted and made for revenge only that we will not reverse the case because of an award of \$700 punitive damages. While we recognize the just doctrine of *respondeat superior* in cases of this character, we regret that the real culprit, the brakeman, is not a defendant jointly with the master and made to bear a part of this burden.

It results that the judgment is affirmed.

*Robertson, P. J., and Farrington, J., concur.*

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M. R. ADKINSON and W. M. ABRAHAM, Respondents, v. VIRGIL McKAY, Appellant.

Springfield Court of Appeals, December 31, 1914.

1. **COVENANTS: Obligations: Defenses.** A maker of an obligation cannot defend himself against its full performance because some one else is equally liable with him and has agreed with him to be wholly so.
2. **WARRANTIES: Breach: Performance in Part: Defenses.** Grantor in a warranty deed covenanted to pay such part of a debt as would release from a deed of trust the lands conveyed. In an action by grantees for breach of this covenant, the fact that the deed of trust also covered other lands and that defendant had paid all of his proportionate part of the debt except a part tendered to plaintiffs, was not a good defense.
3. **PLEADINGS AND PROOF: Payment: Burden of Proof.** The burden of proving payment is on him who asserts the same or seeks to avail himself of its benefits and the rule applies to a defendant, although plaintiff has alleged nonpayment met by a denial.
4. **COVENANTS: Breach: Incumbrance: Excessive Payment to Remove: Burden of Proof.** Action for breach of covenant in warranty deed to remove an incumbrance from land conveyed, plaintiff's grantees having been forced to pay the mortgage

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debt. A prima-facie case was established by plaintiffs. The burden was upon the defendant to show that the payment made by plaintiff to remove the incumbrance was excessive, such being his contention.

5. **APPELLATE PRACTICE: Assuming too Great Burden: Evidence: Effect.** Where plaintiff is only required to make out a prima-facie case, which he does, the fact that he undertook to do more and thereby elicited some incompetent evidence, does not affect the merits of the case.
6. ———: **Evidence: Incompetent: Harmless Admission.** The fact that the bookkeeper of the company holding a note testified that he did not receive payments in question personally at all times or at all times personally make book entries concerning same, but supervised same, did not render his testimony as to payments wholly incompetent.
7. **WARRANTIES: Breach of Covenant: Establishment: Evidence.** Action for breach of covenant in warranty deed to remove incumbrance from land conveyed. It was not necessary to establish plaintiff's right to recover that they should introduce in evidence the secured note paid by them, its absence being accounted for and the amount, date and rate of interest not being in dispute.
8. ———: **Breach of Covenants: Unavailing Defense.** In an action for breach of covenant in warranty deed to remove an incumbrance from land conveyed, where plaintiffs (grantees) had been forced to pay the note secured by deed of trust covering the land conveyed and the land of another, that the holder of the note, on receiving payment, released all the land will not avail as a defense.

Appeal from Pemiscot County Circuit Court.—*Hon. Frank Kelly*, Judge.

**AFFIRMED.**

*Ward & Collins and Shephard, Reeves & McKay*  
for appellant.

(1) The court erred in the admissibility of evidence. Witness must state facts and not opinions and conclusions; and questions calling for opinions and conclusions are not permissible. *Sparr v. Wellmann*, 11 Mo. 230; *Masterson v. Transit Co.*, 204 Mo. 507;

Weatherall v. Patterson, 31 Mo. 458; Marshall v. Taylor, 168 Mo. App. 247; Eskine v. Loewenstein, 82 Mo. 307-308. (2) In a breach of warranty suit the burden is upon the plaintiff not only to show that there has been a breach of the warranty (which is admitted in this case), but also to show the amount of damage to plaintiff. 11 Cyc. 1152; Duffy v. Sharp, 73 Mo. App. 316.

*Oliver & Oliver* for respondent.

(1) Where a written instrument cannot be produced and is accounted for, secondary proof of its contents is admissible. Sec. 1983, R. S. 1909. (2) Possession of a note before its loss entitles the witness to testify the amount due on it and the interest it bore. Jenkins v. Emmons, 117 Mo. App. 10; Gould v. Trowbridge, 32 Mo. 291. (3) A judgment should not be reversed in order to have a jury calculate interest. Sec. 2082, R. S. 1909; Lumber Co. v. Harvester Co., 215 Mo. 221; McCormack H. Mach. Co. v. Blair, 164 S. W. 252.

STURGIS, J.—On March 17, 1909, the defendant and one Jones were the owners of a tract of land in New Madrid county, Missouri, and on that date conveyed same to the plaintiffs by warranty deed for the recited consideration of \$5600. This land and an adjoining tract were then encumbered by a deed of trust dated June 27, 1904, executed by former owners of both tracts to secure a note for \$3849.37, at six per cent interest, given for the purchase price in favor of the Himmelberger-Harrison Lumber Company. The deed of defendant and Jones to plaintiffs, in addition to the usual covenants of warranty, contains this special covenant: "There is a deed of trust against this and other lands in favor of Himmelberger-Harrison, of Cape Girardeau, Mo., for \$3800, which the said Virgil



McKay and R. H. Jones agrees to pay such part of which as will release the lands herein described on or before April 6, 1909."

The petition alleges that defendant McKay and said Jones breached this special and other covenants of the deed by failing and refusing to pay the amount secured by the deed of trust or sufficient of it to discharge the land conveyed at any time and that, as owners of the land, these plaintiffs were compelled to pay and did pay \$561.15 on August 11, 1911, to the holder of this deed of trust in order to free this land of the said encumbrance. The plaintiffs asked and obtained judgment for this amount with interest thereon from the time of payment to the date of trial.

The suit was originally against the defendant McKay and the heirs of his co-warrantor, Jones, but as each of them were jointly and severally liable and McKay could have been sued singly, it is not necessary to discuss the manner or reasons for the suit being dismissed as to such heirs and the final judgment being against McKay only. We will treat him as being the sole defendant.

The defendant's answer denied that plaintiffs were compelled to pay the amount claimed by them in order to release the land in question from the lien and encumbrance of this deed of trust. It then sets up the special defense that this deed of trust encumbered other lands which were liable *pro rata* for their proportion of the mortgage debt; that defendant had paid that *proportional* part of said deed of trust which would release the land in question in conformity with the special covenant in the warranty deed to plaintiffs, except a balance of \$250; that defendant on a date subsequent to the payment by the plaintiffs tendered the plaintiffs the said \$250; that defendant gave notice to plaintiffs on the day of making this tender that the owner of the other tract of land was liable

for the remaining proportion unpaid after the amount of the tender by the defendant had been deducted.

Seeing that defendant had covenanted with plaintiffs that he would cause this land conveyed to them to be freed of this encumbrance, we do not see how he can escape liability for not doing so because the deed of trust constituting the encumbrance covered other lands liable *pro rata* for their share of the mortgage debt; nor because the defendant paid his proportional part of the mortgage debt when he had covenanted to pay all; nor because the owner of the other tract was liable for this unpaid balance. As to plaintiffs these matters are *res inter alios acta*. As between the owners of the respective tracts of land these facts would constitute a liability for contribution to him who had paid more than his just share in the discharge of the deed of trust, and so it might constitute a defense as against the owner of the secured note provided he had made a valid agreement to hold the respective landowners for only the proportional part of each. No agreement, however, either express or implied, made by the defendant with the other landowner or with the holder of the secured note to which plaintiffs were not parties could relieve defendant of his obligation to plaintiffs to comply with the terms of his warranty. After complying with his covenant with plaintiffs, the defendant may seek redress or contribution from those failing in their obligation to him on any contract, express or implied. A maker of an obligation cannot defend against its full performance because some one else is equally liable with him or has agreed with him to be wholly so. The court should have stricken out these special defenses, but, as it made an equivalent ruling on the evidence offered to sustain the same, the plaintiffs got the benefit of a correct ruling. It should be stated, however, that while defendant proved that he and the other landowner made a division of the amount due on this deed of trust and an agree-

ment as to the amount each should and would pay in discharge of the encumbrance covering both of these tracts of land, he did not show a valid agreement by the holder of the note that it would release each one of them from liability for the separate share of the other.

The only issue in the case arises from defendant's denial that plaintiffs were compelled to pay \$561.15 to release the land from the encumbrance of the deed of trust and on this point the defendant raised the question as to the sufficiency and competency of plaintiffs' evidence. Let us consider what plaintiffs had to prove on this point. A consideration of defendant's evidence will aid in doing this. The defendant contends that his evidence shows that he owed no more than the \$250 tendered to plaintiffs and no more need have been paid by them. Defendant arrives at this conclusion by testifying that he and the other landowner made an agreement as to the amount each should pay and that he had paid his proportional part down to that sum or less. He says that he does not know whether the owner of the other tract had paid his part or not and that he does not know how much was due and unpaid on this secured note. The owner and holder of the secured note exhibited at the trial a statement taken from its books showing the times and amounts of the several payments made and credited on the note, and defendant does not claim that any payment made by himself was not properly credited and he does not know whether the owner of the other tract made any payments not properly credited. He does not claim that the amount paid by plaintiffs is not the correct amount based on these payments. His contention, therefore, is reduced to this: That as the other landowner ought, as between them, to have paid his agreed share, it is incumbent on plaintiffs to show that he did not do so.

We have seen, however, that it was defendant's duty under his covenant to pay whatever part up to all of this encumbrance that was necessary to discharge the lien on plaintiffs' land. He had no right to cast this duty on the plaintiffs. It was his business to ascertain the amount due, whether from himself or the other landowner, and to pay it or cause it to be paid. He was repeatedly urged to do this and, after failing to do so for over two years, was notified to be present at the time the plaintiffs paid the amount sued for, but declined. There is no doubt that the holder of the secured note was demanding the amount paid by plaintiffs as the correct amount due and would not release plaintiffs' land except on such payment. The defendant also knew that the holder of this note was demanding a larger sum than what defendant was claiming to be his proportional part and he had made repeated promises "to fix it." The holder of the note stated it had sent defendant statements as to the amount paid and due on the note to which defendant made no objections and defendant does not deny this fact. What were plaintiffs to do under these circumstances? Their land was encumbered under a deed of trust containing a power of sale. The plaintiffs could not even await the result of a suit on the note to ascertain how much the defendant should pay to secure a release of this land. What action could plaintiffs take to secure a release other than to pay the amount due on the note as demanded by the holder? Could defendant cast on plaintiffs the burden of a lawsuit, even if such was possible on his part, to ascertain the amount which must be paid to release this land? It was certainly defendant's primary duty to tender to the holder of the deed of trust the amount necessary to secure a release and if refused to take the proper steps to enforce such release. Could defendant, by doing nothing, cast on plaintiffs the necessity of acting at their peril and, after they had acted by paying

the amount demanded by the holder, then discharge his liability by tendering to them the lesser amount claimed by defendant to be due from him? In *Duffy v. Sharp*, 73 Mo. App. 316, 325, the court said: "Upon the face of the record his title was subordinate to the judgments (deed of trust), hence he was not compelled to await a sale under the judgments (deed of trust) and take his chances in a contest with the purchaser, but he had the right to pay off the judgments (deed of trust) and sue for his reimbursement." Under these circumstances were the plaintiffs required to do more than to act in good faith in making such payment in order to make the amount paid conclusive? The plaintiffs' right to recover in this action is based on the fact that the amount paid by them to secure the release of this land was necessary and no reasonable method is suggested by which a release could have been procured by plaintiffs except to pay the amount demanded. While the question is not before us, we see no reason why the defendant might not recover, even from the holder of the note, any excess amount demanded and received under such circumstances as for money paid under duress.

We need not decide the point just discussed for the reason that plaintiffs went further and proved, *prima facie*, at least, that the amount paid by them was actually due and unpaid on the secured note. One of the plaintiffs testified that after waiting more than two years for defendant to discharge his covenant to remove this encumbrance and after repeated requests to and promises by defendant to do so, defendant was notified to be present at the final adjustment and payment of the amount demanded; that, on defendant failing to take any action or be present, the plaintiffs paid the amount demanded by the holder of the note and that such holder would not release the land for anything less. This witness's evidence was clearly competent to prove these facts and may be rejected for

all other purposes. The auditor of the company owning and holding the secured note was a witness for plaintiffs. He testified that he had charge of the collection of this and other notes for his company; that all payments on same were made to him direct or at once reported to him for credit and that he kept or supervised the keeping of the books showing all payments on this and other notes and debts due his company. He exhibited a statement from his books showing the dates and amounts of payments made on this note and defendant did no more than to say that he did not know whether same was correct or not. Defendant does not deny that he had received similar statements on previous occasions without questioning their correctness. This auditor then testified that these were all the payments made and on the basis of these payments there was due and unpaid on the note, which he calculated at the time, the amount paid by plaintiffs, \$561.15, and that his company would not release the land except on this amount being paid. This much of his evidence was competent and made a prima-facie case for plaintiffs, which was in no way contradicted or destroyed by the other evidence. We may grant that defendant might have shown that some payments were made either by himself or the other landowner not properly credited or that a wrong calculation was made as to the amount due, but such was not done or attempted to be done. The burden of proving payment is on him who asserts the same or seeks to avail himself of its benefits, 22 Ency. of Law (2 Ed.), 587; 30 Cyc. 1264; 16 Ency. of Pl. & Pr., 182; Carder v. Primm, 47 Mo. App. 301, 305; Ferguson v. Dalton, 158 Mo. 323, 59 S. W. 88; Diel v. Stegner, 56 Mo. App. 535, 539; State to use v. Richardson, 29 Mo. App. 595; Griffith v. Creighton, 61 Mo. App. 1, 4; and this rule applies to a defendant, although the plaintiff has alleged non-payment met by a denial. [22 Ency. of Law (2 Ed.), 588; 16 Ency. of Pl. & Pr., 179.] The facts elicited

from this auditor that he did not always receive the payments made in person and did not personally make all the entries in the books kept by him, but that same was done under his supervision, did not make his evidence wholly incompetent but left enough to make a prima-facie case at least. The defendant's evidence went to the special defense set up by him and which, as we have seen, amounted to no defense at all. All the plaintiffs were required to do was to make a prima-facie case and the fact that they undertook to do much more and elicited some incompetent evidence in so doing does not affect the merits of the case.

The fact that the secured note, which was delivered to plaintiffs on their paying same, was not produced at the trial is not material. This is not a suit on that note and its absence was accounted for. The amount, date and rate of interest are not in dispute. There is no evidence that payments were endorsed on the note not shown by the holder's books. The calculation of the amount due was made while the note was in the hands of the holder and, as stated, there is no showing that any payments made were not properly credited. The fact that the holder of the note, after receiving full payment of the same, released not only the land of the plaintiffs but the other tract covered thereby was but a performance of its duty and in no wise prejudices the rights of the defendant. The defendant may have rights growing out of this transaction which he can enforce against other parties, but we fail to find any valid defense to the plaintiffs' cause of action. Minor alleged errors have been considered but we find them not substantial.

The judgment will, therefore, be affirmed.

*Robertson, P. J., and Farrington, J., concur.*

W. E. SMITH, W. J. McMILLIN and CURTIS CORDER, composing the firm of SMITH, McMILLAN and COMPANY, Respondents, v. ST. LOUIS AND SOUTHWESTERN RAILWAY COMPANY, Appellant.

Springfield Court of Appeals, December 12, 1914.

1. **SHIPMENTS: Interstate Shipments: Interstate Commerce Law.** An interstate shipment is governed by the Interstate Commerce Law and the construction placed thereon by the Federal courts.
2. **CARRIERS: Of Live Stock: Stipulations in Contract: Binding When.** In a contract for an interstate shipment of live stock a stipulation therein contained that in case of loss of or injury to the live stock the shipper should give notice thereof within one day after delivery to destination before he would be allowed to recover damages, is valid. And a shipper giving notice after the expiration of the time specified is not entitled to recover.

Appeal from Dunklin County Circuit Court.—*Hon. W. S. G. Walker*, Judge.

**REVERSED.**

*Wammack & Welborn* and *Sam H. West* for appellant.

Since respondents did not give the notice of their claim for damages as provided by the tenth paragraph of the written contract of shipment, they are not entitled to recover in this case. *Hamilton v. Railroad*, 177 Mo. App. 145; *Joseph v. Railroad*, 175 Mo. App. 18; *Clegg v. Railroad*, 203 Fed. 971.

No appearance for respondents.

FARRINGTON, J.—The plaintiffs, a partnership, brought suit against the defendant railway company for damages occasioned by a delay in the ship-



ment of a carload of hogs which were loaded and turned over to the railway company on January 7, 1913. The shipment was from Malden, Mo., and was consigned to the Dimmitt-Caudle Smith Commission Company of the National Stock Yards in the State of Illinois. The plaintiffs' evidence showed that the car was delayed on account of a defective drawhead, and that by reason thereof the plaintiffs were damaged on account of shrinkage in weight.

Plaintiffs admitted that the hogs were shipped under a contract with the defendant which contained the following provision: "Tenth: That as a condition precedent to the collection of any damages, for any loss or injury to live stock covered by this contract the shipper will give notice in writing of the claim therefor to some general officer or the nearest station agent of the carrier, or to the agent at destination, as the case may be, and before such stock is mingled with other stock, such written notice to be served within one day after delivery of the stock at destination. The purpose of requiring this notice is to enable the carrier to investigate and settle such claims before suit is instituted, and no action for any such damages shall be brought or maintained unless the notice in writing mentioned in this paragraph be given within one day after the delivery of the stock at destination. The filing of suit for such damage shall not be a compliance with this requirement and no one, excepting a general officer of said carrier, has authority to waive such notice and he only expressly in writing."

This contract, according to its terms was made limiting the common law liability of the carrier in consideration of a reduced freight charge.

The plaintiffs attempted to show a notice as required by the provision in the contract by testifying that the consignees advised them that they had put in a claim against the defendant for the damages and that they had sent plaintiffs a copy of the letter,

which the plaintiffs had lost. Plaintiffs' witness, however, testified that a copy which was shown him and which was introduced in evidence by the defendant was to the best of his recollection about what his copy contained. This letter, when introduced by the defendant, showed that it was written on January 13, 1913. The hogs reached the stock yards so as to be sold on January 10, 1913. This letter of January 13th making claim against the defendant is the only attempted showing of the notice required by the tenth section of the contract, and the evidence clearly shows that this was written after the expiration of the one day time limit specified in the contract.

It is unnecessary to discuss the law on this question as it is now well settled that such a shipment as this—an interstate shipment—is governed by the Interstate Commerce Act and the construction placed thereon by the Federal courts. Our State courts have recently passed on the question in the cases hereinafter cited. The identical question was considered in a case where a similar contract provision appeared, decided by the United States Circuit Court of Appeals for the Eighth Circuit (*Clegg v. St. Louis & S. F. R. Co.*, 203 Fed. 971) and the contract provision (requiring notice to be given within one day after the delivery of the stock at destination) was upheld. The giving of the required notice was a condition precedent to recovery. This the plaintiffs failed to show; indeed, the evidence shows without controversy that such notice as was required was not given. The railway company is subject only to the liability imposed by this contract, and the decisions of our State uniformly so hold. [See *Joseph v. Railroad*, 175 Mo. App. 18, 157 S. W. 837, and *Hamilton v. Railroad*, 177 Mo. App. 145, 164 S. W. 248, and cases cited.] The plaintiffs failed to make out their case and the jury should have been so instructed. The judgment is reversed. *Robertson, P. J.*, and *Sturgis, J.*, concur.

CHARLES JONES, Respondent, v. CITY OF  
CARUTHERSVILLE, Appellant.

Springfield Court of Appeals, December 12, 1914.

1. **MUNICIPAL CORPORATIONS: Acts of Officers: When Unauthorized: City Not Liable.** The street commissioner of a city of the fourth class constructed a drain whereby surface water was collected and thrown onto plaintiff's lot, thereby damaging plaintiff. No ordinance had been passed by the city giving authority for the construction of said drain. The city cannot be held liable for the damages, though it paid for the work under a general appropriation ordinance.
2. ———: **Cities of Fourth Class: Surface Drainage: Improvements: Necessity of Ordinance.** Cities of the fourth class can legally make surface drainage improvements only by an ordinance. [Sec. 9400, R. S. 1909.]

Appeal from Pemiscot County Circuit Court.—*Hon.*  
*Charles B. Faris*, Judge.

REVERSED.

*Vance J. Higgs* and *Arthur L. Oliver* for appellant.

The evidence offered by plaintiff as a whole, showed that if plaintiff was injured it was through the unauthorized acts of the street commissioner, as he was not directed or empowered either by ordinance or by resolution of the board of mayor and aldermen of said defendant to do such work, and defendant was not, therefore, answerable in damages to plaintiff even if actually injured. Sec. 9400, R. S. Mo. 1909; *Ellison v. Gleason*, 136 Mo. App. 521; *Garden v. City of Parkville*, 114 Mo. App. 527; *Stewart v. City of Clinton*, 79 Mo. 603; *Thompson v. Boonville*, 61 Mo. 282; *Koeppon v. City of Sedalia*, 89 Mo. App. 648; *Rowland v. Gallitan*, 75 Mo. 134; *Werth v. Springfield*, 22 Mo. App. 12.

*Ward & Collins* for respondent.

Whether this is a nuisance or damage for negligence in throwing the surface water in a body on plaintiff, still defendant is liable without an ordinance because it ratified the act of its officers in constructing the drains, ditches and street improvements that caused the damage in this case. *Imler v. Springfield*, 30 Mo. App. 679; *Schumaker v. St. Louis*, 3 Mo. App. 297; *Holmes v. Board of Trade*, 81 Mo. 137; *Soulard v. City of St. Louis*, 36 Mo. 553; *Akers v. Kolkmeier*, 97 Mo. App. 520; *Devers v. Howard*, 88 Mo. App. 261; *Water Co. v. Aurora*, 129 Mo. 583; *State ex rel. v. Milling Co.*, 156 Mo. 620; *Foncannon v. City of Kirksville*, 88 App. 279; *Dooley v. Kansas City*, 82 Mo. 477; *Cook v. Cameron*, 144 Mo. App. 143; *Whitworth v. Webb City*, 204 Mo. 602. "A city is liable for collecting the surface water and diverting it from its natural course and throwing it upon plaintiff's property in a great volume." *Cannon v. St. Joseph*, 67 Mo. App. 370; *Lewis v. Springfield*, 142 Mo. App. 89; *Sandy v. St. Joseph*, 142 Mo. App. 330; *Carson v. Springfield*, 53 Mo. App. 289.

FARRINGTON, J.—This action was brought by the plaintiff to recover damages alleged to have been sustained by him by reason of the defendant, through its street commissioner and by and under the direction of its street and alley committee, having constructed a system of street improvements—drains, sewers and ditches—to convey the surface water from some forty blocks of the city so that the system terminated near plaintiff's property, by reason whereof a large quantity of surface water collected and stood on plaintiff's lot to his damage in the sum of \$2500.

The answer of the defendant, after admitting that it is a city of the fourth class, is a general denial.

Plaintiff introduced evidence to show that surface water accumulated on his lot in large quantities and stood there and became stagnant and damaged a number of trees and improvements. His evidence shows that no ordinance or resolution was ever passed authorizing anyone for the city to dig this ditch and the drains that led into it which terminated at plaintiff's property.

There was a general ordinance of the city specifying the powers and duties of the street commissioner as well as those of the street and alley committee or committee on improvements. In this general ordinance the street commissioner is given power to superintend the construction of any drain or other improvement whenever required by any ordinance or resolution of the board. He is also empowered to see that all streets, alleys, drains and other public places are kept free from obstructions and in a cleanly condition. This last-mentioned duty does not seem to be in the general ordinance one that requires his duties to be performed under a special ordinance.

The charge in the petition is that "the defendant constructed a large number of ditches, drains and sewers and wrongfully, negligently and carelessly changed the natural flow of the surface water, rain water and sewage, and negligently and carelessly collected, gathered and held the same in a body down on and upon plaintiff's property, and negligently failed to devise or construct any way or means to remove said water so collected and held on plaintiff's property."

At the close of plaintiff's case the defendant offered an instruction in the nature of a demurrer to the evidence which was overruled.

The defendant showed that no ordinance or resolution was ever passed authorizing anyone to build the ditch in question or the drains leading up to

it by reason whereof surface water was collected so as to overflow on plaintiff's property.

The respondent seeks to supply the absence of an ordinance or resolution by showing that the city ratified the act of the street commissioner in paying him and the workmen for digging the ditch. We have recently gone into this same question in the case of *Bigelow v. City of Springfield*, 178 Mo. App. 463, 162 S. W. 750, where a number of cases in this State bearing on the question will be found cited and discussed, first, as to the liability of the city for acts of a street commissioner in performing duties which result in damage to property owners where there is no ordinance authorizing the work to be done when under the law the city can only act through an agent who has been empowered by ordinance to do the work; and second, as to the payment of the street commissioner and his collaborators under a general appropriation not taking the place of the ordinance required to authorize the work.

Plaintiff here seeks to hold the city because the street commissioner failed to see that the drains and other public places were kept free from obstruction and in a cleanly condition. The charge in the petition is that the city wrongfully, carelessly and negligently changed the flow of surface water by gathering and holding the same in a body on plaintiff's property and negligently failed to devise or construct any way or means to remove the water. There is no allegation or proof that there were any obstructions that made the water flow on plaintiff's property other than the manner in which the ditch was constructed. Besides, that part of the general ordinance referred to means that the street commissioner shall keep the lawfully constructed drains, alleys, etc., free from obstruction and in a cleanly condition.

A great many of the cases cited by respondent were referred to in the Bigelow case, *supra*, and it is unnecessary to discuss them here.

The case of *Lewis v. City of Springfield*, 142 Mo. App. 84, 125 S. W. 824, was an action for discharging water on a citizen's property and the city was held liable, but the opinion shows that the drain in that case was constructed under and by virtue of ordinances.

Section 9400, Revised Statutes 1909, provides that such improvements as were made in this case, when undertaken by cities of the fourth class, must be by ordinance.

The evidence clearly shows that if plaintiff was damaged it was through the act of the street commissioner and those acting with him—absent any ordinance or resolution making their act an act of the city.

The plaintiff failed to make out a case against the defendant and the jury should have been so instructed. The judgment is reversed. *Robertson, P. J.*, and *Sturgis, J.*, concur.

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J. L. COY, Respondent, v. ST. LOUIS and SAN FRANCISCO RAILROAD COMPANY, Appellant.

Springfield Court of Appeals, December 14, 1914.

1. **CARRIERS: Damages to Goods Shipped: Statement.** Action against carrier for damages on account of alleged negligence in handling two cars of watermelons in transit. Statement of case.
2. **CAUSES OF ACTION: Only One from Single Wrongful Act: Not to be Separated in Parts.** Only one cause of action arises from a single wrongful act. Such cause of action cannot to split up and various suits brought for different items of damage.

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3. ———: Only One for Single Wrongful Act: Exception. The only exception to the rule that "one shall not be twice vexed for the same cause" is found in the case of unavoidable ignorance of the full extent of the wrongs or injuries received.
4. **EVIDENCE: Pleadings and Judgment of Sister State: Admitted by Constitutional Provisions in Every State.** By Art. 4, Sec. 1, Constitution of U. S., the pleadings and judgment in a suit in a court of a sister State, duly authenticated, are admissible in evidence in the courts of every State.
5. **CARRIERS: Injuries to Shipment: To Person Accompanying: Transitory Actions.** An action against a carrier for damages to goods shipped and to the person who accompanes them at the time, both grow out of the same tort and are both common-law actions for negligence. They are transitory actions and may be brought wherever the defendant may be found and jurisdiction over it obtained.
6. **NEGLIGENCE: Law of Place of Tort.** In a transitory common-law action for negligence the law of the place where the tort was committed governs.
7. **ARKANSAS: Acts of Congress Relating to: Statutory Provisions.** Various acts of congress and territorial laws of Missouri relating to the territory now embraced within the State of Arkansas which was formerly a part of the territory of Missouri, considered.
8. **JUDICIAL NOTICE: Common Law in Arkansas: Congressional Provisions.** Because of the various acts of congress as above, judicial notice is taken of the fact that the common law is in force in Arkansas.
9. **COMMON LAW: In Force Where: Presumptions.** The presumption that the common law is not in force in a State will be indulged in, only as to those States which were never subject to the common law.
10. **CARRIERS: Negligence in Shipment: Law of Place.** In an action against a carrier for negligence, where the negligence complained of occurred in Missouri, the laws of Missouri govern the rights and liabilities of the parties.
11. ———: **Negligence: Injuries to Persons and Property: Splitting Action.** Plaintiff made a shipment of melons on defendant's road, accompanying same. By negligence of defendant plaintiff was injured and the melons damaged. Judgment was had in Arkansas against the carrier for personal injuries. He may not now split his cause of action and maintain an action in Missouri for damages to the melons.



Appeal from Dunklin County Circuit Court.—*Hon. W. S. C. Walker*, Judge.

REVERSED.

*W. F. Evans, Moses Whybark and A. P. Stewart* for appellant.

(1) A single wrongful act gives only one cause of action, no matter how numerous the items of damage may be, and the damages resulting from one and the same tort must be assessed and recovered in one suit. *Pucket v. Railroad*, 25 Mo. App. 650; *Steiglider v. Railroad*, 38 Mo. App. 511; *Bank v. Tracey*, 141 Mo. 259; *Stickford v. St. Louis*, 75 Mo. 309; *Cook v. Globe Printing Co.*, 227 Mo. 524; 1 Enc. Pl. & Pr., p. 159. (2) A single cause of action cannot be split up so as to make different causes of action; and since plaintiff had instituted a suit in Arkansas on one item of damage arising from the alleged wrongful act, the subsequent suit (the case at bar) instituted in Missouri on some other item of damage arising from the same wrongful act is barred. *Railroad v. Traube*, 59 Mo. 362; *Wagner v. Jacoby*, 26 Mo. 532; *Mateer v. Railroad*, 105 Mo. 355; *Spratt v. Early*, 199 Mo. 501; *Bircher v. Boemler*, 204 Mo. 562; *Puckett v. Annuity Ass'n*, 134 Mo. App. 506; *Bank v. Tracy*, 141 Mo. 258; *Donnell v. Wright*, 147 Mo. 647. (3) It has been held by the Supreme Court of Missouri that, in the absence of any showing to the contrary, it will be presumed that the common law prevails in a sister State. *State v. Clay*, 100 Mo. 579-581; *Burdiet v. Railroad*, 123 Mo. 230. (4) It is only in respect to those States which were never subject to the common law that the courts will not indulge the presumption, and, in the absence of proof, apply the statute laws of the forum. *White v. Shaney*, 20 Mo. App. 389; *F lato v. Mulhall*, 72 Mo. 522 (Texas); *Sloan v. Torrey*, 78 Mo. 623 (Louisiana); *Hurley v.*

Railroad, 57 Mo. App. 675 (Texas); Crone v. Dawson, 19 Mo. App. 220 (Illinois).

*R. J. Smith and J. L. Fort* for respondent.

(1) The plea in bar must be decided according to the laws of Arkansas and not according to the laws of Missouri. The judgment of a court of one State, when introduced in evidence in another State, is entitled to receive the same faith, credit and respect that is accorded to it in the State where rendered, so if valid and conclusive there, it is so in all other States. But a judgment from another State is entitled to no greater effect or finality than would be accorded to it in the State where rendered; and hence if it would be there inconclusive, impeachable or re-examinable, it will receive no greater consideration or measure of finality in other States. *Peet v. Hatcher*, 112 Ala. 514; *Wood v. Watkinson*, 17 Conn. 500; *Newman v. Bank*, 92 Ill. App. 638; *Cox v. Ahlefeldt*, 105 La. 543; *Wernwag v. Pawling*, 25 Am. Dec. 317; *Jaster v. Currie*, 94 N. W. Rep. 995; *Bowersox v. Gitt*, 12 Pa. Co. Ct. 81; *Babcock v. Marshall*, 50 S. W. Rep. 728; *Danville v. Cunningham*, 48 Fed. 510; *Brown v. Parker*, 28 Wis. 21; *Mattoon v. Clapp*, 8 Ohio, 248; *Ball v. Warrington*, 108 Fed. 472; *Jacobs v. Marks*, 182 U. S. 583; *Chapman v. Chapman*, 48 Kan. 636. (2) The courts of this State cannot presume that the common law is in force in Arkansas. *Clark v. Barnes*, 58 Mo. App. 667. (3) Distinct causes of action capable of being sued on separately and successively may arise from one and the same tortious act in favor of the same plaintiff, as where damages to goods and injuries to the person are caused by the same negligent or wrongful act. *Watson v. Co.*, 27 S. W. Rep. 924; *Och v. Co.*, 80 Atl. Rep. 495; *Borum v. Taylor*, 19 Conn. 122; 23 Cyc. 1191; *Brunsdon v. Humphrey*, 14 Q. B. Div. 149.

FARRINGTON, J.—The plaintiff recovered a judgment for \$492 as damages sustained by him occasioned by the alleged negligence of the defendant in handling two cars of watermelons while being switched by defendant in its yards at Chaffee, Mo., on August 17, 1912. The facts are that plaintiff was shipping two carloads of watermelons over defendant's railroad and was accompanying them in person, and while the cars were being switched they were run against some other cars with such force as to break, bruise and greatly damage the watermelons. Plaintiff also sustained injuries to his person in the collision.

It appears that plaintiff, prior to the commencement of this suit, instituted a suit against this defendant in the circuit court of Crawford county, Arkansas, wherein he recovered a judgment for \$18,000 for his physical injuries. The injuries to his person, for which he recovered the judgment in Arkansas, and the damage to his melons—the subject of this action—were occasioned by the same alleged negligent and wrongful act of the defendant in kicking its cars together at the time and place mentioned. The plaintiff on cross-examination admitted he had recovered the judgment in Arkansas for his personal injuries caused by this collision and the defendant introduced in evidence a copy of the pleadings and the judgment rendered in the Arkansas case.

If the judgment for \$18,000 had been rendered in Missouri, there is no doubt that it would be a bar to the present action because a single wrongful act gives rise to only one cause of action on which there can be but one recovery, regardless of the numerous items of damage that may have been suffered—the damages resulting from one and the same tort must be assessed and recovered in one action; the cause of action cannot be split up and various suits brought for the different items of damage where such items grew out of one wrong. [Steiglider v. Railway Co., 38 Mo. App. 511;

Wheeling Savings Bank v. Tracey, 141 Mo. l. c. 259, 42 S. W. 946; Mateer v. Railway Co., 105 Mo. 320, 355, 16 S. W. 839; Stickford v. City of St. Louis, 75 Mo. 309, approving Stickford v. City of St. Louis, 7 Mo. App. 217; Pucket v. Railway Co., 25 Mo. App. 650; Cook v. Globe Printing Co., 227 Mo. l. c. 524, 127 S. W. 332; Union Railroad and Transportation Co. v. Traube, 59 Mo. l. c. 362; Puckett v. National Annuity Ass'n, 134 Mo. App. l. c. 506, 114 S. W. 1039; Spratt v. Early, 199 Mo. l. c. 501, 97 S. W. 925; and Bircher v. Boemler, 204 Mo. l. c. 562, 103 S. W. 40.] The reason given in these cases for this rule is that "one shall not be twice vexed for one and the same cause." The only exception to this rule as appears in these decisions is that found in the case of Wheeler Savings Bank v. Tracey, 141 Mo. l. c. 259, 42 S. W. 946, which is that unavoidable ignorance of the full extent of the wrongs received or injuries will relax the rule. In the case under consideration the plaintiff was fully advised of the injury (not only to himself for which he procured a judgment in Arkansas) sued for herein when he instituted and recovered his judgment for this tort in Arkansas.

The pleadings and judgment in the Arkansas suit were properly introduced in evidence by the defendant, duly authenticated, under the acts of Congress. It was said in the case of Western Assurance Co. v. Walden, 238 Mo. l. c. 61, 62, 141 S. W. 595:

"The record in this case discloses the facts that said judgment and transcript were duly authenticated according to the act of Congress governing such matters; also shows that the circuit court of Cook county, Illinois, is a court of record, and has a judge presiding, a clerk attending upon the same, as well as a seal of court. Upon that state of facts the law presumes that such a court is a court of general jurisdiction and that it had jurisdiction of the subject-matter of the action pending therein, and of the parties thereto;

and in the absence of proof to the contrary such presumption is conclusive. (Cases cited.)

“Section I of article IV of the Constitution of the United States provides that ‘full faith and credit shall be given is every State to the public acts, records and judicial proceedings of every other State.’ Full faith and credit cannot be given to judgments and judicial proceedings of another State, by the courts of this, except where those matters are called to the court’s attention, and that can only be done in such a case by offering or introducing them in evidence.”

Respondent, however, contends that *splitting a cause of action* is a common law, not a statutory defense, relying upon the case of Clark v. Barnes, 58 Mo. App. 667, holding that the courts of Missouri cannot presume that the common law is in force in Arkansas, and that in those cases in which our courts will not presume that the common law is in force in a sister State, they will, in the absence of pleading or proof, presume that the statute law of that State is like the statute law of this, citing McManus v. Railroad, 118 Mo. App. 152, 94 S. W. 743. Respondent argues from this that as the rule against splitting causes of action is a defense under the common law and is not a statutory rule in Missouri, there being a failure on the part of appellant to prove that Arkansas is a common law State, it could not rely on the rule against splitting, as stated, under the common law, and that as there is no statute in Missouri against splitting causes of action, our courts cannot hold, in the absence of proof, that there is a statute in Arkansas which prevents splitting.

The action in the circuit court of Crawford county, Arkansas, for the personal injuries and the present action for damages are both common law actions for negligence, both growing out of the same tort; they are therefore transitory and could be brought wherever the defendant might be found and jurisdiction over it

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obtained. [22 Am. and Eng. Ency. Law (2 Ed.), 1378.] The Missouri courts have in a number of cases held that in a transitory common law action for negligence the law of the place where the tort was committed governs. In the case of *Root v. Railway*, 195 Mo. l. c. 370, 92 S. W. 621, the following language was used: "And, furthermore, it seems to be settled law that in a transitory common law action, where suit is brought in a State other than where the injury happened, the interpretation of the common law obtaining in the State where the cause of action accrued, the *lex loci*, will govern." [See, also, *Fogarty v. Transfer Co.*, 180 Mo. l. c. 502, 79 S. W. 664; *Williams v. Railroad*, 106 Mo. App. l. c. 63, 79 S. W. 1167; and *Chandler v. Railroad*, 127 Mo. App. l. c. 41, 106 S. W. 553.]

Counsel for appellant have met the contention and show that the common law of England was extended over the territory now embraced within the State of Arkansas when such territory was a part of the Territory of Missouri. In their reply brief is set out the various acts of Congress and territorial laws of Missouri relating to the territory now embraced within the State of Arkansas, and we adopt that part of their brief:

To the above rules, in the main, and as general propositions, we agree; but we do not concede that respondent's conclusion therefrom, as respects the State of Arkansas, is correct, for the reason that that State was originally a part of the territory of Missouri, and was such when it was organized as a territory on March 2, 1819. [3 U. S. Stat. at Large, p. 493.] The common law was adopted in Missouri on January 19, 1816. [Territorial Laws of Mo., p. 436.] The common law, therefore, had been adopted by Missouri Territory, and it applied to all the territory which now composes the State of Arkansas, three years before the organization of "Arkansaw Territory," because Arkansas was then a part of Missouri Territory.

Section 10 of the Act of Congress organizing a territorial government for Arkansas provides: "Sec. 10. That all the laws which shall be in force in the Territory of Missouri on the fourth day of July next, not inconsistent with the provisions of this Act, and which shall be applicable to the Territory of 'Arkansas,' shall be and continue in force in the latter Territory until modified or repealed by the legislative authority thereof." [Act Cong. March 2, 1819, 3 U. S. Stats. at Large, 493.]

A brief summary of the various laws in the early period of the history of the Louisiana Accession will not be out of place here, since it will serve to explain the advent of the common law in that part of the Louisiana Purchase not embraced within the limits of the then Territory of Orleans, but embraced within all that portion of the Accession north of the thirty-third degree of north latitude.

By an Act of Congress, entitled, "An Act erecting Louisiana into two territories and providing for the temporary government thereof" approved March 26, 1804, it was provided:

"That all that portion of country ceded by France to the United States, under the name of Louisiana, which lies south of the Mississippi territory, and of an east and west line to commence on the Mississippi River at the thirty-third degree of north latitude, and to extend west to the western boundary of said cession, shall constitute a territory of the United States under the name of the Territory of Orleans.

"Sec. 12. The residue of the Province of Louisiana ceded to the United States shall be called the District of Louisiana." [1 Territorial Laws of Mo., p. 5; 2 U. S. Stats. at Large, p. 283.]

Afterwards, by an Act of Congress entitled "An act further providing for the government of the District of Louisiana" approved March 3, 1805, the name was changed from "District of Louisiana," to "Ter-

ritory of Louisiana." Section 1 of this Act provided: "That all that part of the country ceded by France to the United States, under the general name of Louisiana, which by an Act of the last session of Congress was erected into a separate district, to be called the District of Louisiana, shall henceforth be known and designated by the name and title of the Territory of Louisiana." [1 Territorial Laws of Mo., pp. 6, 7.]

By section 1 of the Act of Congress entitled, "An act for the admission of the State of Louisiana into the Union and to extend the laws of the United States to the said State," approved April 8, 1812, it was provided:

"Whereas, the representatives of the people of all that part of the territory or country ceded, under the name of 'Louisiana,' by the treaty made at Paris on the thirtieth day of April, one thousand eight hundred and three, between the United States and France, contained within the following limits, that is to say: Beginning at the mouth of the River Sabine; thence, by a line to be drawn along the middle of said river, including all islands, to the thirty-second degree of latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the River Mississippi; thence down the said river to the River Iberville; and from thence, along the middle of said river, and Lakes Maurepas and Porchartrain, to the Gulf of Mexico; thence bounded by the said gulf, to the place of beginning, including all islands within three leagues of the coast; did, on the twenty-second day of January, one thousand eight hundred and twelve, form for themselves a Constitution and State Government, and give to the said State the name of the State of Louisiana, in pursuance of an Act of Congress entitled, 'An Act to enable the people of the Territory of Orleans to form a Constitution and State Government, and for the ad-



mission of the said State into the Union, on an equal footing with the original States, and for other purposes.' And the said Constitution having been transmitted to Congress, and by them being hereby approved, therefore be it enacted that the said State shall be one of the United States, and admitted into the Union," etc. [2 U. S. Stats. at Large, p. 701.]

This Act of Congress made the thirty-third degree of north latitude the northern boundary of the State of Louisiana, the same as the Act of Congress organizing the District of Louisiana made that parallel of latitude the southern boundary line of that District.

Afterwards, by an Act of Congress, entitled "An Act providing for the government of the Territory of Missouri," approved June 4, 1812, the name of the Territory was changed from Louisiana to Missouri. Section 1 of that Act provided: "That the Territory heretofore called Louisiana shall hereafter be called Missouri." [1 Territorial Laws of Mo., p. 9.]

The Governor and Judges of the Territory of Louisiana, by an act passed June 27, 1806, created a district out of the southwestern part of the District of New Madrid, and named it the "District of Arkansasaw." [1 Territorial Laws of Mo., p. 68.] This law was repealed by an Act of the Territorial Legislature, approved July 7, 1807, and the jurisdiction of the Court of Common Pleas of New Madrid District was extended over the territory formerly composing the "District of Arkansasaw." [1 Territorial Laws of Mo., p. 179.]

By an Act of the Legislature of the Territory of Missouri, approved December 31, 1813, the Territory of Missouri was divided into counties, and Arkansasaw County was created out of a portion of New Madrid and extended south to the thirty-third degree of north latitude, or the "northern boundary line of the State of Louisiana." [1 Territorial Laws of Mo., pp. 293, 294.]

By an act of the same Legislature, approved December 15, 1818, Arkansas county was divided into three separate counties. [1 Territorial Laws of Mo., pp. 589, 591.]

By an act of the Legislature of the Missouri Territory, approved January 19, 1816, the common law of England, etc., was adopted as before stated. [1 Territorial Laws of Mo., p. 436.]

This law is substantially the same now in both the States of Missouri and Arkansas as when adopted, and when it was so adopted it applied to the entire Territory of Missouri, which Territory then embraced all of the Louisiana Accession north of the thirty-third parallel of latitude.

By an Act of Congress entitled, "An Act establishing a separate territorial government in the southern part of the Territory of Missouri," approved March 2, 1819, the Territory of "Arkansaw" was created. Sections 1 and 10 of this Act provided:

"Sec. 1. That from and after the fourth day of July next, all that part of the Territory of Missouri which lies south of a line beginning on the Mississippi River at thirty-six degrees north latitude, running thence west to the River St. Francois; thence up the same to thirty-six degrees thirty minutes north latitude, and thence west to the western territorial boundary line, shall, for the purposes of a territorial government, constitute a separate territory, and be called 'Arkansaw Territory.' "

"Sec. 10. That all the laws which shall be in force in the Territory of Missouri on the Fourth day of July next, not inconsistent with the provisions of this Act, and which shall be applicable to the Territory of 'Arkansaw,' shall be, and continue, in force in the latter Territory until modified or repealed by the legislative authority thereof." [3 U. S. Stats. at Large, p. 493.]

We must therefore hold that we will take judicial notice that the common law was once extended over the territory now embraced within the State of Arkansas, and the presumption must necessarily be, in the absence of proof, that it continues in force.

The law of this State is that it is only in those States which were never subject to the common law that our courts will not indulge the presumption that the common law is not in force. [See, *Flato v. Mulhall*, 72 Mo. 522; *Sloan v. Torry*, 78 Mo. 623; *White v. Chaney*, 20 Mo. App. 389; *Hurley v. Railway Co.*, 57 Mo. App. 675; *Crone v. Dawson*, 19 Mo. App. l. c. 220, 221.] There is a long line of cases in this State cited by appellant holding that in territory over which the common law once prevailed, the presumption, in the absence of proof, is that it is still in force.

With reference to the case of *Clark v. Barnes*, 58 Mo. App. 667, we can find nothing from reading the opinion showing that the attention of the court was called to the territorial laws governing the territory now embraced within the State of Arkansas. We cannot, therefore, agree with the conclusion in that case that the courts of this State cannot presume that the common law is in force in Arkansas.

On the other hand, the wrong having been committed in Missouri, the law of this State relative to the rights and liabilities should govern, regardless of where the plaintiff chose to file his suit.

The judgment is reversed. *Robertson, P. J.*, and *Sturgis, J.*, concur.

## STATE OF MISSOURI, Respondent, v. JAMES WESTBROOK, Appellant.

Springfield Court of Appeals, December 12, 1914.

1. **CRIMINAL LAW: Information: Evidence: Variance: Slander and Libel.** Criminal prosecution for slander and libel. Where the evidence fails to show that substantially the same words were used by the accused as he is charged with having spoken there is a variance.
2. **LIBEL AND SLANDER: Sustaining Charge: Proving Identical Words Used: Equivalence Not Sufficient.** To substantially sustain the charge of slander and libel there must be substantial proof of the identical words or enough thereof as will support a charge and mere equivalence is not sufficient.
3. **INSTRUCTIONS: Libel and Slander: Jury Judges of Law and Fact.** In a trial for slander and libel an instruction was given telling the jury that it was the judge of the law and fact and that it was not bound to find as the judge directed. *Held*, not error.
4. ———: ———: **Charge and Proof to Correspond.** In a trial for slander and libel an instruction was given authorizing a conviction if the jury found that "the accused spoke the words charged or words substantially equivalent." This was error. It is the charge and proof which must substantially correspond, not the words.
5. ———: **Libel and Slander: No Evidence on Which to Base Instruction: Error.** Trial for slander and libel. A given instruction *held* erroneous because there was no evidence to support it.
6. ———: **Comment on Evidence: Error.** An instruction which singles out testimony of a witness and comments thereon is erroneous.
7. **INDICTMENTS AND INFORMATIONS: Libel and Slander: Separate Conversations.** In a trial for slander and libel, where libellous conversations are alleged to have been held by accused at different times in the presence of different persons, the better and safer practice requires that the conversations be separately stated.

Appeal from Stoddard County Circuit Court.—*Hon.*  
*W. S. C. Walker*, Judge.

REVERSED AND REMANDED.

*Mozeley & Woody* for appellant.

The State was permitted to convict the defendant of the offense charged by the proof of other and distinct conversations or statements than that charged. This evidence was incompetent and should not have been admitted for that purpose. *State v. Pulitzer*, 12 Mo. App. 6; *Tippens v. State (Tex.)*, 43 S. W. 1000; *Collins v. State (Tex.)*, 44 S. W. 846; *State v. Railroad*, 219 Mo. 156, 117 S. W. 1173; *State v. Stike*, 149 Mo. App. 104, 129 S. W. 1024; *State v. Phillips*, 233 Mo. 299, 135 S. W. 4; *State v. Spray*, 174 Mo. 569, 74 S. W. 846; *Bill of Right*, Sec. 22; *State v. Wellman*, 253 Mo. 302, 161 S. W. 795; *State v. Smith*, 250 Mo. 274, 157 S. W. 307; *State v. Horton*, 247 Mo. 657, 153 S. W. 1051; *State v. Teeter*, 239 Mo. 475, 144 S. W. 445; *Adams v. State (Tex.)*, 138 S. W. 117; *State v. Meysenberg*, 171 Mo. 1, 71 S. W. 229. (2) Instruction No. I, given for the State, was erroneous, because it authorized the jury to convict the defendant if they found that he spoke the words charged, or words substantially the same. This was a misdirection. It is the charge and the proof thereof which must substantially correspond, and not the words. *Conran v. Fenn*, 159 Mo. App. 664, 140 S. W. 83; *State v. Fenn*, 112 Mo. App. 531, 86 S. W. 1098, and cases there cited; *Bundy v. Hart*, 46 Mo. 460, *Mix v. McCoy*, 22 Mo. App. 493; *Wood v. Hilbish*, 23 Mo. App. 399; *Hauser v. Stergers*, 137 Mo. App. 560, 119 S. W. 52; *Kunz v. Hartwig*, 151 Mo. App. 94, 131 S. W. 721; *Lemaster v. Ellis*, 173 Mo. App. 332, 158 S. W. 904; *Tippins v. State (Tex.)*, 43 S. W. 1000; *Parsons v. Henry*, 177 Mo. App. 329, 164 S. W. 241.

*John L. Hodge* for respondent.

There is no merit to appellant's contention that the State was permitted to convict defendant of the offense

charged by proof of other and distinct conversations or statements than that charged. It is proper to charge conjunctively, in one count, more than one act; and if defendant is guilty of either, the offense is made out. R. S. 1909, Sec. 4484; R. S. 1909, Sec. 4713; R. S. 1909, Sec. 4817; State v. Karnes, 51 Mo. App. 293; State v. Daniel, 40 Mo. App. 356; Hauser v. Steiger, 137 Mo. App. 564, 565; Brown v. Wintsch, 110 Mo. App. 270, cases cited; State v. Fenn, 112 Mo. App. 531; State v. Buck, 43 Mo. App. 443. When taken as a whole the instruction complained of does not take from the jury its function of determining whether or not the language spoken constitutes slander. It is clear this instruction is merely advisory and not peremptory. This theory is further borne out by instruction number three given by the court at the request of the defendant, which tells the jury that they are the judges of the law as well as of the facts, and are not required to accept the instructions of the court as conclusive of the law. State v. Simpson, 136 Mo. pp. 666; Section 4817 R. S. Mo. 1909; Hauser v. Steigers, 137 Mo. App. 565.

FARRINGTON, J.—The appellant was convicted in the circuit court of Stoddard county on an information charging him with having unlawfully, falsely and maliciously charged and accused one Eva G. Pentacost of fornication, “by then and there falsely speaking of, and concerning her, the said Eva G. Pentacost, in the presence and hearing of Milo Castleman, Charley McMillan, Frank Asa, James Young, Frank Fowler and divers other persons to the prosecuting attorney unknown . . . the following false and slanderous words, imputing to the said Eva G. Pentacost the act and offense of fornication, that it to say, ‘We saw her,’ meaning the said Eva G. Pentacost, ‘and Chester Bridges holding sexual intercourse together with each other.’ ”

Instructions numbered 1 and 3 given on behalf of the State are as follows:

"1. The court instructs the jury that if you believe and find from the evidence that at the county of Stoddard and State of Missouri, within one year prior to September 1, 1913, the defendant, James Westbrook, did, in the presence and hearing of Milo Castleman, Charley McMillan, Frank Asa, Frank Fowler or either of them, falsely, and maliciously charge and accuse Eva G. Pentacost of fornication by then and there in the presence of and hearing of Milo Castleman, Charles McMillan, Frank Asa, Frank Fowler, or either of them, falsely, maliciously speaking of and concerning the said Eva G. Pentacost, in a conversation then and there had, concerning the character and reputation of the said Eva G. Pentacost for virtue and chastity, the following words, to wit: 'We saw her and Chester Bridges holding sexual intercourse together with each other,' or words substantially the same, the said James Westbrook then and thereby falsely and maliciously charging and intending to charge the said Eva G. Pentacost with, and accuse and impute to her, the act and offense of fornication, by then and there having illicit sexual intercourse with the said Chester Bridges. Then the jury should find the defendant guilty of slander as charged in the information, and assess his punishment at imprisonment in jail for a term of not exceeding one year, or a fine of not exceeding \$1000 or by both imprisonment in jail and by a fine not exceeding the above limit in each instance. And the court further instructs the jury that by the term 'maliciously,' as used in the instructions and information, is not meant necessarily either ill will, hatred or spite, but means the intentional doing of a wrongful act without just cause or excuse.

"3. The witness, Chester Bridges, was asked if he had stated to one Claud Jarrell that he had felt the legs and breasts of the said Eva G. Pentacost, and the

said Chester Bridges denied that he had made such statement—witness, Jarrell, testified that he had made such statement to him. Now if you believe that said Bridges made such statement to said Jarrell, you may take such contradiction into consideration and give it such weight as you may deem it entitled to receive in determining the credibility of such Bridges as to the remainder of his evidence given before you by the witness, Bridges, and such testimony as to said contradiction is not competent for any other purpose in this case.”

The record before us contains numerous errors.

Without detailing the conversations and reproducing the language used by the witnesses on behalf of the State in relating what the defendant did say to them with reference to Chester Bridges and Eva G. Pentacost, it is enough, so far as this opinion is concerned, to state that no single witness throughout the entire record testified that the defendant used the words charged in the information or any substantial number of the words used to sustain the charge made. They did testify to conversations with defendant from which it would be reasonably inferred that he stated that he had seen Chester Bridges and Eva G. Pentacost in the act of having sexual intercourse, but the words sworn to by the witnesses as having been used by the defendant were merely the equivalent and not the words actually charged in the information to have been used nor any of the words charged in the information.

It has been so long the settled rule in this State, both in criminal and civil trials, that there is a variance where the proof fails to show that substantially the same words were used by the accused as he is charged with having used, that it will require a mere reference to the decisions to sustain the ruling we make. In the opinions it is pointed out that to substantially sustain the charge means that substantial proof of the identical words or enough of the identical words as



will support a charge is necessary. Equivalence will not do; there must be enough of the *same* words. This rule is found stated in the following cases: *State v. Fenn*, 112 Mo. App. 531, 86 S. W. 1098; *Conran v. Fenn*, 159 Mo. App. 664, 140 S. W. 82; *Coe v. Griggs*, 76 Mo. 619; *Christal v. Craig*, 80 Mo. 367; *Noeninger v. Vogt*, 88 Mo. 589; *Berry v. Dryden*, 7 Mo. 324; *Street v. Bushnell*, 24 Mo. 328; *Birch v. Benton*, 26 Mo. 153; *Bundy v. Hart*, 46 Mo. 460; *Mix v. McCoy*, 22 Mo. App. 488; *Wood v. Hilbish*, 23 Mo. App. 389; *Hauser v. Steigers*, 137 Mo. App. 560, 119 S. W. 52; *Kunz v. Hartwig*, 151 Mo. App. 94, 131 S. W. 721; *Parsons v. Henry*, 177 Mo. App. 329, 164 S. W. 241; *Crandall v. Greeves*, 170 Mo. App. 638, 168 S. W. 264; *Lemaster v. Ellis*, 173 Mo. App. 332, 158 S. W. 904.

Appellant charges that instruction number 1 is faulty in several particulars: (1) That it invades the province of the jury because section 4821, Revised Statutes 1909, provides that the jury under the direction of the court in slander cases shall determine the law and the fact. (2) That on reading the instruction it is found that the jury was told on the finding of certain facts to return a verdict of guilty. (3) That this was a peremptory charge. (4) That the instruction pretended to cover the whole law of the case, and that the jury might well have found defendant guilty and never looked at another instruction given in the case.

A discussion of this subject is found in *Sands v. Marquardt*, 113 Mo. App. 490, 87 S. W. 1011; *State v. Simpson*, 136 Mo. App. 664, 118 S. W. 1187; *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614; *Heller v. Pulitzer Pub. Co.*, 153 Mo. 205, 54 S. W. 457; and *State v. Powell*, 66 Mo. App. 598.

There was an instruction given at appellant's request telling the jury that it was the judge of the law and fact in this character of cases and that it was not bound to find as the judge directed.

However logical appellant's argument may be considered, the Supreme Court in the case of *State v. Armstrong*, 106 Mo. 395, 16 S. W. 604, approved instructions given as these were, which of course is binding on us.

The instruction is defective because it authorized a conviction if the jury found that defendant spoke the words "or words substantially the same." It is the charge and the proof thereof which must substantially correspond and not the words.

Again, there was no evidence whatever that defendant ever spoke the words charged in the information, and the instruction should not have been given because there was no evidence upon which to base a finding of guilty.

Instruction number 3 was a singling out of testimony and a comment thereon and should not have been given. [*Dungan v. Railroad*, 178 Mo. App. 164, 165 S. W. 1116.]

The charge was that these words were spoken then and there in the presence of some four or five men. The proof shows that at no time were all of these witnesses or in fact more than any two of them present when the story told them by the defendant was related. One was told at a barn, another at some other place and another at still some other place. Appellant contends that the proof did not sustain the charge in this respect; that where a slander is uttered to different persons at different places, each utterance is a separate offense, and that one charged with such offenses should be charged in separate counts. Without deciding this point we will say that the better and safer practice, at least, would require that the several conversations be separately stated. [*Brown v. Wintsch*, 110 Mo. App. 264, 84 S. W. 196; *Schmidt v. Bauer*, 60 Mo. App. 212; *Adams v. State (Tex.)*, 138 S. W. 117.] In the case last cited it was pointed out that the admission of testimony showing separate offenses was admissible only

for the purpose of showing motive and intent and that the jury should have been so instructed.

It was admitted by the prosecuting witness and the witness Bridges that they were at a place in a road in a buggy on the date the witnesses for the defendant say they were there. All agree that a scuffle occurred in the buggy between Bridges and the prosecuting witness. Bridges and the prosecuting witness say the scuffle was over a card and a ring. The witnesses for defendant say the scuffle was over an entirely different thing. The issue was sharply drawn on this point and the testimony irreconcilably conflicting.

This case involves a serious question concerning the character of two persons, one the prosecuting witness and the other this defendant, and before guilt can be stamped upon the accused he must have been accorded a fair trial under the law of this State as guaranteed to him by the Constitution and statutes and decisions together with the evidence adduced. He did not get a fair trial so far as the law is concerned. The judgment is therefore reversed and the cause remanded. *Sturgis, J.*, concurs. *Robertson, P. J.*, concurs herein, but without changing his views as to the application of the law in the case of *Lemaster v. Ellis*, 173 Mo. App. 332, 158 S. W. 904.

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A. D. SWEZEA, Defendant in Error, v. W. E. JENKINS and J. H. HOLLOWAY, Plaintiffs in Error.

Springfield Court of Appeals, December 12, 1914.

1. JUSTICES OF THE PEACE: Default Judgments: Appeal: Defective Service: Waiver: Appearance. Since the taking of an appeal from a judgment by default from a justice of the peace court does not operate as a waiver of the matter of defective service and confer jurisdiction over the person, the filing on

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appeal in the circuit court of a motion to dismiss the action would not be an appearance except for the purpose therein stated.

2. ———: ———: **Questioning Jurisdiction of Subject-matter, Only.** Where a motion to dismiss in circuit court questioned the jurisdiction of a justice of the peace who rendered the judgment only as to the subject-matter and not as to the person, and the subject-matter in question was that over which the justice had jurisdiction, the circuit court properly overruled the motion.
3. ———: **Limited Jurisdiction: Must be Shown.** A justice of the peace has only limited jurisdiction and jurisdiction assumed must be shown somewhere in his proceedings.
4. ———: **Jurisdiction: Promissory Note: Evidence Consulted.** In a suit on a promissory note, to decide whether or not a justice has jurisdiction, not only the face of the proceedings but the entire proceedings, including the evidence, may be consulted.
5. ———: ———: **Record: Evidence Allunde.** On a writ of error to the circuit court, the record proper only was brought up, the jurisdiction of the person being questioned in a case appealed from a justice of the peace. The judgment will not be *held void* merely because the fact of the proceedings fails to show jurisdiction. Such jurisdiction may be shown by evidence *allunde*.

Appeal from Carter County Circuit Court.—*Hon. W. N. Evans*, Judge.

**AFFIRMED.**

*Garry H. Yount* for plaintiffs in error.

(1) The record must show the jurisdiction of the subject-matter. *Barnes v. Plessner*, 121 Mo. App. 679; *Grant v. Stubblefield*, 138 Mo. App. 555; *Severn v. Railroad*, 149 Mo. App. 631. (2) Plaintiff must show that justice has jurisdiction. *Tremble v. Elkin*, 88 Mo. App. 229. (3) Jurisdiction is determined from the entire record in the case. *Sappington v. Lenz*, 53 Mo. App. 44; *Trimble v. Elkin*, 88 Mo. App. 229; *Smith v. Rock Co.*, 132 Mo. App. 297. (4) Unless the fact of jurisdiction appears in the case, the lack thereof is inherent,

and appearances in justices' or circuit court does not waive it. *Bank v. Doak*, 75 Mo. App. 332; *State v. Metzger*, 26 Mo. 65; *Cooper v. Barker*, 33 Mo. App. 181; *Corrington v. Morris*, 43 Mo. App. 456; *State ex rel. v. County Court*, 66 Mo. App. 96; *Beth v. Railway*, 136 Mo. App. 234; *Grant v. Stubblefield*, 138 Mo. App. 555; *Sanders v. Selleck*, 165 Mo. App. 392.

No appearance for defendant in error.

FARRINGTON, J.—Plaintiff (defendant in error) commenced suit on a promissory note for \$50 signed by defendants (plaintiffs in error) before a justice of the peace within and for Kelley township in Carter county. The summons was issued and placed in the hands of the constable of Kelley township for service. His return shows that he executed the writ by reading the same to and in the presence of the defendants "in Johnson township." The transcript of the justice shows that defendants failed to appear for trial, and a judgment was entered against them for \$50.51. An appeal to the circuit court of Carter county was perfected by defendants, and when the case was reached on the docket there, the defendants filed a motion to dismiss the plaintiff's action because the justice "had no jurisdiction of the subject-matter" and because "the circuit court acquired no jurisdiction of the subject-matter on appeal." The motion was overruled; whereupon the circuit court proceeded with the cause, its judgment being that the appeal be dismissed for want of prosecution and that plaintiff recover of and from the defendants the sum of \$54.15. Defendants sued out a writ of error and have brought here for our consideration only the foregoing proceedings, and ask that we set aside the judgment of the circuit court on the record proper. The evidence was not preserved by bill of exceptions and brought here.

The point made by plaintiffs in error is that the transcript filed in the circuit court does not show that

the justice had jurisdiction of this cause. They direct our attention to the fact that neither the transcript of the justice nor the record entries in the circuit court show the residence of any of the parties; nor does the fact anywhere appear that Johnson township adjoins Kelley township. They insist that since the justice court is one of limited jurisdiction, its transcript must affirmatively show jurisdiction of the cause, and that if it does not, as the jurisdiction of the circuit court on appeal from the justice is derivative, the action should be dismissed.

Since the last decision of the Supreme Court (*Meyer v. Insurance Co.*, 184 Mo. 481, 83 S. W. 479) holds that the taking of an appeal from a judgment by default in a justice's court by a defendant to the circuit court does not operate as a waiver of the matter of defective service and confer jurisdiction over the person, the filing of the motion in the circuit court would not be an appearance except for the purpose therein stated. [*Handlan-Buck Manufacturing Co. v. Railroad*, 167 Mo. App. 683, 151 S. W. 171.]

Now the motion filed in the circuit court by defendants asking that plaintiff's action be dismissed questions the jurisdiction of the justice over the "subject-matter," saying nothing as to jurisdiction of the person. The circuit court, therefore, had sufficient ground for overruling the motion because the "subject-matter" of the suit was a promissory note for \$50, over which the justice of course had jurisdiction; and this would be sufficient ground upon which to dispose of the writ of error. [*State ex rel. Pacific Mut. L. Ins. Co. v. Grimm*, 239 Mo. 1. c. 177, 143 S. W. 483.]

The plaintiffs in error, however, are in no better shape to insist on the point here had their motion been directed to the jurisdiction as to the person. All the decisions evidence the general proposition that a justice court is one of limited jurisdiction, and, being such, the jurisdiction the justice assumes must some-

where he shown in his proceedings. Some confusion has arisen as to just where the jurisdictional facts must appear. It would seem that in all cases where the property which is the subject-matter of a suit brought before a justice of the peace fixes his jurisdiction, then the jurisdiction must be made to appear from some entry made by him in the case. [Sawyer v. Burris, 141 Mo. App. 108, 121 S. W. 321; State ex rel. Castleman v. Cunningham, 106 Mo. App. 58, 79 S. W. 1017; Belshe v. Lamp, 91 Mo. App. 477; Barnes v. Plessner, 162 Mo. App. l. c. 464, 142 S. W. 747; Severn v. Railroad, 149 Mo. App. 631, 129 S. W. 477; Robinson v. Schlitz, 135 Mo. App. 32, 115 S. W. 472.] This will be found on reading cases involving injury to live stock by railroad companies, suits in attachment, mechanic's lien suits, and the like. As was said in the case last cited (l. c. 464): "But though such be true as to cases of this character, the doctrine is much relaxed with respect to the ordinary class of cases falling within the jurisdiction of the justice, when the essential jurisdictional facts appear in the proof made in the case, though they are not shown on the face of the record proper. For instance, where it appears in the proof that both plaintiff and defendant reside in the same or an adjoining township in which the suit is instituted, the matter of jurisdiction sufficiently appears. [Trimble v. Elkins, 88 Mo. App. 229-236.] Our statute (Sec. 7399, Revised Statutes 1909) provides that 'Every action recognizable before a justice of the peace shall be brought before some justice of the township, either: First, wherein the defendants, or one of them, resides, or in any adjoining township,' etc." [See, also: Lutes & Dulaney v. Perkins, 6 Mo. 57; Collins v. Kammann, 55 Mo. App. 464; Rowe v. Schertz, 74 Mo. App. l. c. 606; Powell v. Adams, 98 Mo. 598, 12 S. W. 295; Sutton v. Cole, 155 Mo. l. c. 213, 55 S. W. 1052; Smith v. Lyle Rock Co., 132 Mo. App. 297, 111 S. W. 831; Sappington v. Lenz, 53 Mo. App. 44; Hammond v. Dar-

lington, 109 Mo. App. 333, 84 S. W. 446; Wissman v. Meagher, 115 Mo. App. 1. c. 87, 91 S. W. 448; Randall v. Lee & Randall, 68 Mo. App. 561; and 24 Cyc. 498.] In considering the same question as to jurisdiction of a county court the Supreme Court in the case of State v. McCord, 207 Mo. 1. c. 526, 106 S. W. 27, held that it is sufficient if jurisdiction appear from the entire record, citing and approving cases hereinbefore referred to. It will therefore be seen that although the proceedings in a justice's court must somewhere disclose the jurisdiction, and in certain cases the jurisdiction must appear on the face of the proceedings, yet in other cases of which such courts entertain jurisdiction one may look not only to the face of the proceedings but to the entire proceedings, that is, the evidence, to ascertain whether the justice had jurisdiction; and, as the case before us falls within the last-mentioned class of cases, if the evidence sufficiently showed that Johnson township adjoins Kelley township, and that the justice had jurisdiction of the cause fixed by the residence of the parties, his judgment was not without jurisdiction. That such jurisdiction can be shown by evidence *aliunde* requires us to hold that the justice's judgment was not necessarily void because the face of the proceedings fails to show jurisdiction. As before stated, only the record proper is brought here for our review, and as we hold it unnecessary that the record proper in this case show the jurisdictional facts claimed by plaintiffs in error not to exist, the contention of the plaintiffs in error is without merit. The judgment is affirmed. *Robertson, P. J., and Sturgis, J., concur.*



## JOHN J. HORNER, and P. C. HORNER, Respondents, v. J. E. FRANKLIN, Appellant.

Springfield Court of Appeals, December 12, 1914.

1. **CONTRACTS: Sale of Corn: Breach: Evidence Examined.**  
Action for breach of contract for sale of corn. Evidence examined and considered sufficient to warrant the finding of the jury that all the crop of corn grown on a certain plantation was sold by defendant to plaintiff and not merely so much thereof as could be delivered by defendant within sixty days.
2. **INSTRUCTIONS: Defense Covered by Separate Instructions.**  
An instruction for plaintiffs covering their whole case, failed to incorporate defendant's defense. No error was committed where another instruction was given for defendant fully submitting his theory of the case.
3. **EVIDENCE: Memorandum of Agent: Not Admissible, When.**  
Action for breach of contract of sale of corn, the controversy being as to the quantity included in the contract of sale. Memorandum of defendant's agent, made at the time the contract was made by telephone communication, is not admissible.
4. **TRIAL: Statements of Counsel: When Not Cause for Reversal.**  
In an action for breach of a contract of sale of corn, certain statements in argument of counsel examined and considered not cause for reversal.

Appeal from Pemiscot County Circuit Court.—*Hon. Frank Kelly*, Judge.

**AFFIRMED.**

*Jones, Hocker, Hawes & Angert* and *Hope, Green & Seibert* for appellant.

(1) The trial court erred in giving to the jury instruction numbered 1, requested by the plaintiffs. It is erroneous as not clearly defining the issues to be tried, and further erroneous because it undertakes to cover the whole case, but at the same time leaves from the consideration of the jury defendant's defense, viz.,

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the theory that McFarland did not agree to sell all the corn, but only such as could be delivered within sixty days. Abs., p. 94; *Hamilton v. Railway Co.*, 114 Mo. App. 513. (2) The trial court erred in refusing to permit defendant to read in evidence the memorandum made by the witness J. H. McFarland of the contract at the time of entering into the same. Abs., pp. 69-70; Vol. XI, Ency. Evidence, pp. 414-416; *Salmon v. Davis*, 29 Mo. 182. (3) The impassioned and improper argument made by plaintiffs' counsel in his closing argument to the jury is alone sufficient to require that this cause be reversed and remanded for a new trial. Abs., pp. 97-99; *Bishop v. Hunt*, 24 Mo. App. 377; *Fathman v. Tumilty*, 34 Mo. App. 241; *Nichols & Shepherd Co. v. Metzger*, 43 Mo. App. 618; *Beck v. Railroad*, 129 Mo. App. 23; *Evans v. Trenton*, 112 Mo. 399; *Haynes v. Trenton*, 108 Mo. 133; *Harrison v. Franklin*, 126 Mo. App. 366.

*Von Mayes, Ward & Collins* for respondents.

(1) Instruction No. I is not subject to criticism. It does not preclude the consideration of defendant's theory as submitted in Instruction No. 3, given for defendant. (2) The witness McFarland, who made the memorandum excluded, testified positively to the terms of the contract, and his recollections were independent from said memorandum. There was no necessity to refer to said memorandum, much less introduce it in evidence. 40 Cyc. 2467; *Coombs v. Coombs*, 86 Mo. 176; *Manion Blacksmithing & Wrecking Co. v. Careras*, 19 Mo. App. 162; *Eberson v. Investment Co.*, 130 Mo. App. 296. (3) The argument of counsel complained of was not such as to warrant reversal. *Nichols & Shephard Co. v. Metzger*, 43 Mo. App. 6, 8; *Evans v. Town of Trenton*, 112 Mo. 399; *Fathman v. Tumilty*, 34 Mo. App. 241; *Ensor v. Smith*, 57 Mo. App. 596; *Back v.*

Railroad, 129 Mo. App. 24; Haynes v. Town of Trenton, 108 Mo. 133.

ROBERTSON, P. J.—This action involves the right of the plaintiffs to recover damages for the failure of the defendant to deliver a crop of corn which the plaintiffs claim to have purchased from him. The corn consisted of the 1911 crop grown on what is called the "Lakeland Plantation Farm," sometimes referred to as the "Lake Farm." The contract was entered into February 16, 1912. Plaintiff claims that they purchased all of the crop, but defendant asserts that he agreed to sell only what he could deliver within sixty days from that date. Defendant delivered a portion of the crop, over six thousand bushels, within the sixty days but refused to deliver the balance, over nine thousand bushels. A jury trial resulted in a verdict for plaintiffs and defendant has appealed.

The defendant first urges that the jury should have been instructed to return a verdict for him for the reason that there was no testimony tending to prove that plaintiff bought all of the corn. To sustain this contention he quotes testimony that is most favorable to him. If there is substantial evidence to support the contract plaintiffs claim they had with defendant we cannot disturb the verdict on that point. We notice the testimony of plaintiffs' agent who, after testifying as to the price and the places of delivery, testified that he bought the corn "known as 'Lake' corn," and that the Lake corn was what was grown on the Lakeland plantation. This witness also testified that as to the negotiations leading up to the purchase, which shows conclusively to our minds that the contract about which he testified was intended to and did include the entire crop. Another witness for plaintiff testified, without objection, that defendant's agent told him that he had sold all of the crop to the plaintiff. To discuss the details of this testimony and analyze the contention of the

defendant with reference thereto would require more space than we feel is justified, since we are clearly of the opinion that the instruction was properly refused.

It is next urged by the defendant that the court erred in giving an instruction in behalf of plaintiffs upon the whole case which did not incorporate therein defendant's defense that he sold only what could be delivered within sixty days. In support of this contention he cites *Hamilton v. Metropolitan St. Ry. Co.*, 114 Mo. App. 504, 513, 89 S. W. 893, which involved a case wherein the instructions were conflicting because one authorized recovery for negligence not pleaded and the other for negligence charged in the petition. Defendant states in its brief however that plaintiffs' instruction "leaves from the consideration of the jury defendant's defense." The instruction hypothetically submitted the plaintiffs' theory and as it was found to be correct the jury must have disbelieved the defendant's theory which was submitted in an instruction given in his behalf, and on his request. It was not error to give the instruction here complained of, and especially since an instruction was given for defendant on his sixty-day theory. [*Johnson v. Springfield Traction Co.*, 176 Mo. App. 174, 186, 161 S. W. 1193.]

The negotiations relative to the corn were had with an agent of the defendant. This agent testified that he had a conversation with plaintiffs' agent over the telephone and at the time made the following memorandum:

"2/16/12 Horner's bid on all corn we have—Lake & Tyler Supply Co.—67c per bu. F. O. B. Tyler & Cooter, he to furnish thrower-back, and said bid was accepted for what corn we can deliver during the next sixty days from above date." This was offered in evidence, but on the objection of the plaintiffs the court refused to admit it. The defendant excepted and assigns the action of the court as error. We hold it was not. *Davis, Adm'r v. McClelland*, in which an opinion

was filed in this court November 14, 1914. The appellant cites on this point *Salmons' Adm'rs v. Davis*, 29 Mo. 176, 182, which was a case where the memorandum was signed by some of the parties sought to be charged therein and read in the hearing of the other party who made no objection thereto.

The following statement made by the attorney for plaintiff in his closing argument to the jury was objected to: "Tell me, that J. E. Franklin, with his sharp financial eye did not look out and see the prices of corn advancing." The testimony was to the effect that when the defendant refused to deliver the balance of the corn he sold it to another party at a great advance in price. Plaintiff had a right to make the deduction from the testimony that defendant had in fact contracted to sell all of the corn to plaintiffs, but that on account of the advance in the price he preferred to ignore his contract with them and sell to other parties, taking his chances with plaintiffs.

Again the plaintiff stated to the jury; "But Horner Brothers had bought it at the price and the same law that governs these boys that went into bankruptcy, and they will always be in bankruptcy if they deal with fellows like J. E. Franklin, I say—." The defendant, for some reason not disclosed by the record, offered testimony to the effect that the plaintiffs had made an assignment for the benefit of their creditors. If this subject was improper for the consideration of the jury the defendant invited the error and cannot be heard to complain if plaintiffs' attorney resorted to this method of overcoming any bad effect he may have conceived it would have on the jury. The court committed no error in ignoring the defendant's objections to all of the above remarks.

There being no error in the case justifying any interference on our part the judgment will be affirmed. It is so ordered.

*Sturgis and Farrington, JJ., concur.*

**FIRST NATIONAL BANK OF MADISON,  
Respondent, v. THOMAS H. STAM, Appellant.**

**Springfield Court of Appeals, December 12, 1914.**

1. **PLEADINGS: Variance: Statutory Provisions: Affidavit of Surprise.** Action on a note due in thirty days, executed by the corporation defendant and another, payable to the corporation and indorsed by it to plaintiff. The petition declared upon a note due in ninety days, executed by the corporation and defendant to themselves and indorsed to plaintiff. The variance held immaterial, in view of Secs. 1846, 1847, R. S. 1909, in the absence of an affidavit of surprise.
2. ———: **Amended Petition: New Cause of Action: Bills and Notes.** Action on a promissory note. Plaintiff filed an amended petition so that the allegations would conform to the note. Such amended petition was not subject to a motion to strike as it did not change the cause of action.
3. **BILLS AND NOTES: Variance: Dismissal.** If there is such a discrepancy between the note declared on and the one filed as an exhibit as not to justify it being offered in evidence, then the instrument sued on is not filed as required by Sec. 1844, R. S. 1909, and the defendant may have the cause dismissed.
4. ———: **Indorsement: Formal Not Always Necessary.** A formal indorsement of a note is not in every instance necessary to pass title. And when the uncontradicted testimony shows that plaintiff purchased the note sued on, that he was the owner thereof and that the payee whose name appeared thereon as having endorsed it was a party defendant, who by his default admitted plaintiff's ownership, it cannot be objected that there was no indorsement.
5. ———: **Provisions in for Attorney's Fee.** Where a note provides for a ten per cent attorney's fee, the holder is entitled to judgment for that amount without proving that it is reasonable.

**Appeal from Iron County.—Hon. E. H. Dearing,  
Judge.**

*Edgar & Edgar, B. H. Boyer and W. L. Colley for appellant.*

(1) The question of variance between the allegations of the petitions and the exhibits filed cannot be raised by demurrer, because the court cannot, in any way, look to them or consider them as a part of the pleadings. *Hadwin v. Ins. Co.*, 13 Mo. 473; *Chambers v. Carthel*, 35 Mo. 375; *Curry v. Lackey*, 35 Mo. 392; *Baker v. Berry et al.*, 37 Mo. 306; *Bowling v. McFarlan*, 38 Mo. 467; *Phillips et al. v. Evans et al.*, 64 Mo. 22; *Peake v. Bell*, 65 Mo. 224; *Pomeroy v. Fullerton*, 113 Mo. 453; *Hubbard v. Slavens*, 218 Mo. 622; *Hanks v. Hanks*, 218 Mo. 678. (2) The proof must conform to the allegations of the petition. The plaintiff cannot allege one state of facts and prove another. *Beck v. Ferrara*, 19 Mo. 30; *Waldhier v. Railroad* 71 Mo. 517-518; *Faulkner v. Faulkner*, 73 Mo. 335; *Cole v. Armour*, 154 Mo. 350-351; *Construction Co. v. Iron Works*, 169 Mo. 156-157; *Huston v. Tyler*, 140 Mo. 262; *Bagnell Timber Co. v. Railroad* 180 Mo. 463; *Joplin ex rel. v. Freeman*, 125 Mo. App. 720; *Holliday v. Jackson*, 21 Mo. App. 660. (3) It is incumbent upon the plaintiff to prove the indorsement as alleged, which has not been done. *Ledlie v. Gamble*, 35 Mo. App. 356; *Nat. Bank v. Pennington*, 42 Mo. App. 355; *Co. Court of St. Louis Co. v. Griswold et al.*, 58 Mo. App. 198; *Safville v. Hoffstetter*, 63 Mo. App. 273; *Bosse v. Weik*, 144 Mo. App. 472. (4) There is no proof in the record of the contracting to pay—the payment—the reasonableness or the value of attorney's fees, and they should not have been allowed. *May v. Crawford*, 142 Mo. 390; *In re Torchia*, 185 Fed. 576-583; *In re Fabacher*, 193 Fed. 556-558; *Merchant's Bank v. Thomas*, 121 Fed. 306-312; *North Atchison Bank v. Gay et al.*, 114 Mo. 203; *Bank v. Martin*, 129 Mo. App. 404; *May v. Crawford*, 142 Mo. 390; *Thompson v. St. Charles Co.*, 227 Mo. 220-238.

*Hope, Green & Seibert* for respondent.

(1) A note made payable to the maker thereof, and endorsed by him in blank, can be recovered on by the holder without proof of endorsement and delivery; the production of the note by the holder with the endorsement thereon prima facie entitling him to recovery. 8 Cyc. p. 86; *Berner v. Steiner*, 108 Ala. 111, 19 So. 806, 54 Am. St. Rep. 144; *Lyon v. Tempinski*, 1 Tex. App. Civil Cases, 79; *Lowrie v. Zunkel*, 49 Mo. App. 153. (2) Under the pleadings in this case, the plaintiff was entitled to judgment without any proof in this case, defendant having filed a general denial, unverified, admitted his execution of the note sued on, both as maker and endorser. R. S. 1909, Sec. 1985; *Smith Co. v. Rembaugh*, 21 Mo. App. 390; *Emery v. Shoe Co.*, 167 Mo. App. 709; *Hahs v. Railroad*, 147 Mo. App. 275; *Johnson v. Woodmen of World*, 119 Mo. App. 102; *Love v. Ins. Co.*, 92 Mo. App. 196; *Faircloth v. Tinsley*, 83 Mo. App. 588; *Thomas v. Life Assn.*, 73 Mo. App. 374; 14 Cyc. P. & P. 662. (3) Under the statutes of Missouri, in order for plaintiff to recover upon a note made payable to the order of one of the makers, it is not necessary that the payee endorse the same, as the note is negotiated within the meaning of the law of Missouri by delivery by the maker for consideration or by his putting it on the market. Sec. 10175, R. S. 1909; *Lowrie v. Zunkel*, 49 Mo. App. 153. (4) Where notes do not correspond with those described in a petition, at most it is only a variance which can only be taken advantage of in the manner pointed out by Sec. 1846, R. S. 1909, on the ground of surprise supported by affidavit, and otherwise the variance is waived. Sec. 1846, R. S. 1909; *Simon Falls Bank v. Leyser*, 116 Mo. 51; *Black v. Epstein*, 93 Mo. App. 459; *Henshaw v. Ins. Co.*, 9 Mo. 336; *Bell Savings Bank v. Taylor*, 69 Mo. App. 99; *Olive Street Bank v. Phillips*, 162 S. W. 722; 8 Cyc. 206,



209; *Hamilton v. Stewart*, 5 Mo. 268; *Barrows v. Million*, 43 Mo. App. 79. (5) The ten per cent attorneys' fee specified in the note sued on, under Missouri law, is a contract, and in an action on the note this provision authorizes the assessment of the ten per cent additional sum, without any testimony whatever as to the value of said services; if in a promissory note the parties stipulate for attorneys' fee in case suit is brought, the terms of the contract control the amount of the recovery. *North Atchison Bank v. Gay*, 114 Mo. 210; 8 Cyc. 321; *Bank v. Martin*, 129 Mo. App. 484; Sec. 9973, R. S. 1909; *Exchange Bank v. Land Co.*, 128 N. C. 193, 38 S. E. 813; *Lock v. Citizens Natl. Bank*, 165 S. W. 539; *Childs v. Juenger*, 162 S. W. 475; *Bank of Neelyville v. Lee*, 168 S. W. 798.

ROBERTSON, P. J.—This is an action against appellant and the St. Francis Oil Company on a promissory note. A trial resulted in a verdict for the amount of the note, interest and attorney's fee. Defendant Stam appealed.

The petition declares on a note for \$4000 dated November 23, 1912, due in ninety days after its date, executed by St. Francis Oil Company and appellant to themselves and indorsed to plaintiff, providing for interest at the rate of eight per cent per annum and for ten per cent attorney's fee if placed in the hands of an attorney for collection. The note filed therewith conforms to these allegations, except it was due in thirty days after its date, was payable to and indorsed by the St. Francis Oil Company and was signed by it, another party and appellant as makers. The plaintiff filed an amended petition accurately describing the note filed, which, upon the motion of appellant, was stricken out because, as alleged by appellant, it set up a different cause of action from that alleged in the original petition. Plaintiff then refiled its original petition to which appellant filed an unverified answer and

the parties proceeded to trial, the St. Francis Oil Company defaulting. When the note was offered in evidence appellant objected thereto on account of the variance above stated. The objection was overruled and the note was admitted in evidence. The plaintiff's cashier testified, without objection, that it owned the note, having paid four thousand dollars therefor. The appellant offered no testimony.

The points urged here are (1) the alleged error of the court in admitting the note in evidence, (2) the alleged absence of proof of indorsement and (3) the alleged error in allowing the attorney's fee.

We rule all of these contentions against appellant; the first one because our Supreme Court in a case similar to this (*Salmon Falls Bank v. Leyser*, 116 Mo. 51, 66-68; 22 S. W. 504) held that such discrepancies as here relied on to defeat an admission of a note in evidence is nothing more than variance which must, to be available, be taken advantage of by an affidavit of surprise under what are now sections 1846 and 1847, Revised Statutes 1909. In that case, as here, the note was admitted in evidence over an objection. Other cases to the same effect are *Olive Street Bank v. Phillips*, 162 S. W. 721 (St. Louis Court of Appeals); *Bell Savings Bank v. Taylor*, 69 Mo. App. 99; *Barrows v. Million*, 43 Mo. App. 79, and *Henshaw v. Insurance Co.*, 9 Mo. 336.

The plaintiff's amended petition did not change the cause of action and the motion to strike it out should not have been sustained. [*Sonnenfield v. Rosenthal*, 247 Mo. 238, 266, 152 S. W. 321.] This case, argumentatively at least, sustains the trial court's action in admitting the note. Under this authority the variance in the note and petition did not constitute an entire failure of proof, it was only a variance covered by said section 1846. No case can likely be found where it is so clear as here that a party has not been "actually misled to his prejudice." The note was on

file over a year before the case was tried, the plaintiff undertook to amend by alleging a correct description of the note, was prevented by appellant who went to trial on an unverified answer. Much is said in appellant's brief about an exhibit being no part of the petition; that he could not reach the variance by demurrer, and that the only way he could have his rights enforced was by an objection to the offer of the note in evidence. Even where the instrument sued on is filed in compliance with section 1844, Revised Statutes 1909, it becomes no part of the petition (*Keator v. Helfenstein Park Realty Co.*, 231 Mo. 676, 680; 132 S. W. 1114), but it is none the less subject to the inspection of the defendant. If there is such a discrepancy in the note declared on and the one filed as to not justify its being offered in evidence then the instrument sued on is not filed as required by said section 1844. When it is not filed defendant can have the cause dismissed. [*Rothwell v. Morgan*, 37 Mo. 107.]

The second point urged by appellant is ruled against him because the uncontradicted and unchallenged testimony shows that plaintiff purchased the note, was the owner thereof and the payee whose name appeared therein as having indorsed it, was a party defendant who, by his default admitted plaintiff's ownership. A formal indorsement of a note is not, in every case, essential to pass title. [Section 10019, Revised Statutes 1909. *Lipscomb v. Talbott*, 243 Mo. 1, 31, 147 S. W. 798, and cases there cited. *Dawson v. Wombles*, 123 Mo. App. 340, 345, 100 S. W. 547.]

In support of defendant's third point it is urged that plaintiff should have proven that ten per cent of the amount found to be due on the note was a reasonable attorney's fee. We resolve this point against him. [*North Atchison Bank v. Gay*, 114 Mo. 203, 210, 21 S. W. 479.] A different rule may be applicable to a note which fixes no amount but provides for a reasonable attorney's fee and it may be that a maker of a

note who agrees to pay a fixed per cent as an attorney's fee should be liable for no more than is reasonable; such questions are not before us. It is our duty to follow the decision of our Supreme Court, and as the Gay case is directly in point here, since the appellant raised no point below as to the reasonableness of the fee and did not complain in his motion for a new trial of the excessiveness of the verdict, it is better that we desist from discussing decisions from other States.

The judgment is affirmed. *Farrington* and *Sturgis, J.J.*, concur.

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CORDELIA GILMORE, Appellant, v. MODERN  
BROTHERHOOD OF AMERICA, Respondent.

Springfield Court of Appeals, December 12, 1914.

1. **PLEADINGS: Insurance: Review of Pleadings.** Action by beneficiary on beneficiary certificate of insurance. Pleadings reviewed.
2. **INSURANCE: Fraternal Benefit Societies: License: Certified Copy or Duplicate: Evidence.** A duly certified copy or duplicate of its license is prima-facie evidence that the license is a fraternal benefit society. (Laws 1911, p. 290, sec. 16.) And there being no contradictory evidence this is sufficient to bring such licensee within the provisions of the law relating to fraternal beneficiary societies.
3. **INSURANCE: Fraternal Benefit Societies: Initiation Prerequisite to Membership.** Initiation is a condition precedent to membership in fraternal beneficiary associations.
4. **EVIDENCE: Fraternal Benefit Societies: Custom of Local Lodge.** Action on beneficiary certificate, the defense being that the certificate was delivered to the insured but that he was never initiated, adopted or admitted as a member as was required by the by-laws as a condition precedent to membership. Evidence was offered of a custom of the local lodge not to exact this condition. There was no error in excluding such evidence where there was no offer to show the number of certificates that

had been thus delivered or that such a course had been pursued by the local lodge so long that the supreme lodge must necessarily have known of it.

5. ———: ———: Provisions of By-laws as to Initiation. Action on beneficiary certificate, the defense being that it was delivered without the insured having been initiated, such initiation being necessary under defendant's by-laws. The by-laws on this point were properly admitted in evidence, being authorized by Laws 1911, p. 292, sec. 22, prohibiting a waiver by subordinate officers of such a provision for initiation.
6. **INSURANCE: Fraternal Benefit Societies: Initiation: Evidence.** Action on a beneficiary certificate of insurance, defended on the ground that the certificate had been delivered but that the insured had never been initiated, as required by the by-laws of the association as a condition precedent to membership. Evidence on the issue of such initiation examined and considered insufficient to go to the jury.
7. **EVIDENCE: Prima-facie Evidence: Definition.** Prima-facie evidence means evidence which is sufficient to establish a fact unless rebutted.
8. ———: Prima-facie Case: Definition. A prima-facie case is one which is, in the absence of explanation or contradiction, an apparent case sufficient in the eyes of the law to establish the fact and if not rebutted, remains sufficient for that purpose.
9. **VERDICT: Directing: When Trial Court Should Direct Verdict.** It is as much the duty of the trial court to direct a verdict for the defendant where the undisputed facts show no liability to have been incurred as it is to submit the case to the jury where the evidence is conflicting.
10. **INSURANCE: Fraternal Benefit Societies: Certificates: Presumptions as to Possession.** Where there is no contradictory evidence it is presumed that a beneficiary certificate was regularly deposited in proper hands. But such presumption will not be permitted to contradict the plain, uncontroverted facts as to how it got into the hands of the individual.

Appeal from Dunklin County Circuit Court.—*Hon. W. S. C. Walker*, Judge.

**AFFIRMED.**

*Bradley & McKay* for appellant.

(1) When appellant proved the death of David Gilmore, the denial of liability on the part of the re-

spondent, and offered the certificate sued on, she established a prima-facie case which entitled her to a verdict. *Mulroy v. Knights of Honor*, 28 Mo. App. 463; *Keily v. Knights of Father Matthew*, 162 S. W. 682; *Forse v. Knights of Honor*, 41 Mo. App. 117; *Chadwick v. Order Triple Alliance*, 56 Mo. App. 474; *McComas v. Life Ins. Co.*, 56 Mo. 573; *Rippstein v. Life Ins. Co.*, 57 Mo. 87; *Cauveren v. Ancient Order of Pyramids*, 98 Mo. App. 433. (2) The court committed error in permitting a copy of the purported by-laws to be offered in evidence (Rec. Page 82) without proper authentication, and this cause ought to be reversed and remanded with directions to enter judgment for appellant. *Thompson v. Royal Neighbors*, 154 Mo. App. 121. (3) The court erred in not permitting plaintiff to prove that it had been the custom of the local lodge to not exact initiation, obligation and adoption into its order before delivering policies to its members as required by section 120 of the by-laws of said order and that such conduct had been permitted on the part of the local lodge to continue for such length of time as to have necessarily been known to the Supreme lodge which was competent on the question of whether or not the defendant by its acts was estopped to deny its liability under the policy sued on herein. *Shartle v. M. B. A.*, 139 Mo. App. 433; *Thompson v. Royal Neighbors*, 154 Mo. App. 109. (4) Respondent's only defense was failure to initiate, adopt and obligate deceased on the part of the local lodge and in order to assert such defense it had to show by the burden of evidence that it comes within the provisions of the law governing fraternal beneficiary associations, which it wholly failed to do. *Thompson v. Royal Neighbors*, 154 Mo. App. 109. (5) This cause ought to have gone to the jury, if the court should hold that respondent by proper evidence brought itself within the provisions of law governing fraternal beneficiary associations, but if not then the court should have directed a verdict for

the appellant. *Keily v. Knights of Father Matthew*, 162 S. W. 682; *Thompson v. Royal Neighbors*, 154 Mo. 109.

*Ely, Pankey & Ely and Sparrow and Page* for respondent.

(1) Respondent showed itself to be a fraternal benefit society, and that Gilmore had never been initiated. He never, therefore, became a member of the society. Without membership, there could be no contract of insurance with him, *Hiatt v. Fraternal Home*, 99 Mo. App. 105; *Loyd v. M. W. A.*, 113 Mo. App. 19; *Shartle v. M. B. A.*, 139 Mo. App. 433; *Porter v. Loyal Americans of the Rep.*, 180 Mo. App. 538, 167 S. W. 578; *Driscall v. M. B. A.*, 77 Neb. 282, 109 N. W. 158; *Loudon v. M. B. A. (Minn.)*, 119 N. W. 425; *Matkin v. Sup.-Lodge*, 82 Tex. 301, 18 S. W. 306; *Harrison v. Sup. Council*, 129 Ia. 303, 105 N. W. 580; *Loyal Legion v. Richardson*, 76 Neb. 562, 107 N. W. 795; *Bacon on Benefit Societies*, 3 Ed., Par. 273-A; *Brittenham v. W. O. W.*, 167 S. W. 587. (2) The evidence was uncontroverted. No question as to the credibility of the witnesses was raised. It was, therefore, the duty of the court to declare the evidence of the testimony as a matter of law. *Gee v. Drug Co.*, 105 Mo. App. 27, 34; *Carter-Montgomerie v. Steel*, 83 Mo. App. 211, at 215; *Hendley v. Globe Refinery Co.*, 106 Mo. App. 20, at 27; *Powell v. Railway Co.*, 76 Mo. 80, at 83. (3) The judgment is manifestly for the right party. This being true, it should be affirmed, regardless of any error, if any there was, committed by the trial court. *Cass v. Bank of Harrisonville*, 157 Mo. 133, at 137; *Foster v. Railroad*, 112 Mo. App. 67; *Walker Bros. v. Railroad*, 68 Mo. App. 465, at 483; *State ex rel. v. Smith*, 141 Mo. 1, at 9; *Albert Grocery Co. v. Grossman*, 100 Mo. App. 338; *State ex rel. v. Jones*, 131 Mo. 194.

FARRINGTON, J.—This is an action by the widow of David Gilmore on a beneficiary certificate for the sum of \$1000 in which her husband was the assured and she was named the beneficiary. The certificate was issued on November 20, 1912, and was delivered by the secretary of the local lodge of the Modern Brotherhood of America at Cardwell, Mo., either on December 4th or December 14th, 1912, at which time the proper amount was paid by the assured to the secretary of the local lodge. David Gilmore died on January 5, 1913, from the ravages of pneumonia. The Supreme Lodge declined to furnish blanks on which proof of his death could be made and instructed the secretary of the local lodge to return to the widow the two assessments which Gilmore had paid him (one was paid on January 4th, the day before Gilmore died). She refused to accept them, and brought this suit. To defeat the action the Supreme Lodge alleged in its answer that deceased had never been initiated, adopted or admitted into the society as a member thereof, having first alleged that it is and was at all times mentioned in plaintiff's petition a fraternal benefit society organized and incorporated under and by virtue of the laws of the State of Iowa, "that it is without capital stock, and was formed and organized and is carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit. That it has a lodge system, with ritualistic form of work and representative form of government, and makes provision for the payment of benefits in event of the death or disability of its members. That as such fraternal benefit society it has, and had at all times mentioned in plaintiff's petition, complied with all the laws of the State of Missouri, relating to such societies, and at said times was engaged in transacting the business of such society in said State of Missouri by authority of, and in compliance with, the law of said State." The



answer then proceeds to set forth provisions appearing in the application, the certificate and the by-laws of the society concerning the necessity of initiation to constitute an applicant a member. The reply was a general denial coupled with a plea that defendant by its acts and conduct had waived its right to rely on failure to initiate and a plea of estoppel. At the close of all the evidence the court directed a verdict for the society and plaintiff appealed.

Appellant contends that respondent did not offer sufficient evidence to bring itself within the provisions of our law relating to fraternal beneficiary associations, citing *Thompson v. Royal Neighbors*, 154 Mo. App. 1. c. 121, 133 S. W. 146.

Since the decision in that case the law as to fraternal beneficiary associations has been changed. [Laws 1911, pp. 284 to 301.] Section 16 of the law as it now stands (Laws 1911, p. 290) provides: "A duly certified copy or duplicate of such license shall be prima-facie evidence that the licensee is a fraternal benefit society within the meaning of this act," the "license" referred to being one obtained by such associations from the superintendent of the insurance department of the State. This is the first time that provision has come before the appellate courts of this State since its enactment. Respondent complied with that law and at the trial introduced in evidence a certified copy of its license to do business in Missouri as such society. There was no attempt to overcome this prima-facie showing; hence it was sufficient. However, respondent went further and introduced in evidence a certified copy of its articles of incorporation showing that it was organized as "a fraternal beneficiary society for the sole benefit of its members and not for profit;" that it has a "lodge system, with ritualistic form of work and representative form of government;" that provision is made "for the payment of benefits in case of death;" and that "the fund from

which the payment of such benefits shall be made, and the expense of said fraternity defrayed shall be derived from beneficiary calls, assessments and dues collected from its members." [See *Westerman v. Supreme Lodge K. of P.*, 196 Mo. l. c. 701, 702, 94 S. W. 470.] Respondent also introduced in evidence the laws of Iowa under which it was organized.

Appellant contends that the judgment should be reversed and the cause remanded with directions to enter judgment for her because the court erred in admitting in evidence a copy of the purported by-laws of the society without proper authentication. It is unnecessary to discuss this question. Gilmore, in his application which became a part of his certificate, agreed as follows: "I waive for myself and beneficiary any all rights to any benefit under this application, or any benefit certificate issued thereon, until . . . I shall have been regularly adopted or initiated in accordance with the ritual of said society, . . . and said benefit certificate shall have been issued in pursuance of this application and delivered to me, after adoption or initiation, . . ." There is no contention that Gilmore was ever initiated and it is shown that he was never in the lodge room.

The authorities agree that initiation is a condition precedent to membership in such associations. [*Porter v. Loyal Americans*, 180 Mo. App. 538, 167 S. W. 578, and cases cited.]

Appellant contends that the court erred in not permitting her to prove that it had been the custom of the local lodge to not exact initiation and that such conduct had been continued on the part of the local lodge for such a length of time as to have necessarily been known to the Supreme Lodge and that such evidence was competent on the question of whether or not the defendant by its acts was estopped to deny liability. On cross-examination of defendant's witness Jones, secretary of the local lodge, it developed that

during the year he had been secretary but one person (besides Gilmore) had applied for membership. Jones testified that he delivered the certificate to that applicant on November 19, 1912, and that the books of the local lodge showed he was initiated on February 15, 1913. He testified that he left the impression on that applicant as well as on Gilmore when he delivered their certificates that they would be in force whether they were initiated or not. Plaintiff in rebuttal called as a witness a man who had served five years as secretary of this local lodge and offered to show that during that period he had "delivered a number of policies to members without their obligation, adoption or initiation." The objection to this offer was sustained and exception saved. There was no offer to show what "number" of certificates had been thus delivered or that such a course of dealing had been carried on by this local lodge so as to have necessarily been known to the Supreme Lodge. Moreover, there was no offer to show that Gilmore knew that certificates had ever been delivered without initiation. He told his wife that he was to be initiated. None of respondent's supreme officers knew that Gilmore had not been initiated. They were informed that he had been initiated. Section 22 of the Act of 1911 (Laws 1911, p. 292) provides that the constitution and laws of the society may provide that no subordinate body, nor any of the subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and respondent's by-laws (which we think were properly admitted in evidence) did contain such a provision as to subordinate officers and did require initiation as a condition precedent to membership.

Appellant insists that the court erred in directing a verdict for the defendant because she contends that on the question of whether or not Gilmore was ini-

tiated she had sufficient proof of that —made by her prima-facie case —to take the question to the jury.

The proof that appellant had was simply the possession of the certificate sued on and the fact that it was delivered to Gilmore on December 14, 1912. Besides this, the secretary of the local lodge had reported on either the 14th or 15th of December, 1912, to the Supreme Lodge that the certificate had been delivered and that Gilmore had been "adopted." In a subsequent report sent in by him in January after Gilmore's death, being a report of the lodge for the month of December, Gilmore's name is shown as having been "adopted" on December 14, 1912. The plaintiff testified that her husband told her he was to be initiated, but she did not know whether he was initiated or not. This is all the evidence offered by plaintiff that she contends should have taken the case to the jury.

Jones, the secretary of the local lodge, was placed on the stand by the defendant and testified that he took the application of Gilmore and sent it in and that in due time the certificate was sent to him to be delivered to Gilmore under the rules and regulations of the society. As hereinbefore shown the by-laws require that before the certificate shall be binding on the Supreme Lodge the applicant must be "adopted, initiated and obligated." Whether these three words call for one and the same proceeding and form is not made very clear in the record as in some places in the certificate and by-laws the words are connected by the conjunctive "and," while in other places they are connected by the disjunctive "or." Jones testified that when the certificate was received by him from the Supreme Lodge, he, not having had much experience in handling and delivering certificates, was under the impression that the matter of initiation was left to the option of the local lodge and was not a requirement of the Supreme Lodge, and that he was further of the impression that when he delivered the certificate to the

applicant that was an "adoption." He testified that acting under this belief he delivered the certificate and led the applicant to believe that the insurance was in force. He stated that the reports which he sent in concerning this case were not made at any lodge meeting but were made by him outside of the lodge room. He also testified that no meeting of the local lodge was held from the time this certificate was delivered to him by the Supreme Lodge until after Gilmore's death. He stated that he also reported the same facts as to the "adoption" etc., with reference to one other member to whom he had delivered a certificate without having him first go through the initiation and take the ritualistic work. Being the secretary of the local lodge, he is the one person connected therewith above all others who would be at any lodge meetings and record the proceedings. His testimony stands uncontradicted as plaintiff makes no attempt to show that there was a meeting at which Gilmore could have been initiated or that he ever went to the lodge room for the purpose of being initiated or that there was ever any entry made during a lodge meeting evidencing an initiation. Plaintiff relies solely upon the presumption raised by the possession of the certificate and the reports made under the circumstances above detailed—for plaintiff's prima-facie case was no more than a presumption that the applicant had been initiated. When that issue was raised by the answer and the facts developed by positive, uncontradicted testimony bearing no stamp of suspicion, nor any attempt on the part of the plaintiff to show that such evidence was untrue or improbable, and in no way attempted to show any countervailing evidence or circumstance, the presumption must of necessity submit to the facts. As said in 22 Am. and Eng. Ency. Law, 1294: "A prima-facie case is that which is received or continues until the contrary is shown. Prima-facie evidence means evidence which is sufficient to establish the fact

unless rebutted; evidence which standing alone and unexplained would maintain the proposition and warrant the conclusion to support which it is introduced." It is, in the absence of explanation or contradiction, an apparent case, sufficient in the eyes of the law to establish the fact, and, if not rebutted, remains sufficient for that purpose. [See, *Smith v. Burrus*, 106 Mo. l. c. 100, 16 S. W. 881; also *Gilpin v. Railway Co.*, 197 Mo. l. c. 325, 94 S. W. 869.] Presumptions disappear in the light of actual facts. [*Mockowik v. Railroad*, 196 Mo. 550, 94 S. W. 256; *Schaub v. Railroad*, 133 Mo. App. l. c. 450, 113 S. W. 1163.]

It is as much the duty of a trial court to direct a verdict for the defendant where the undisputed facts show no liability to have been incurred as it is to submit the case to the jury where the evidence is conflicting. [*Powell v. Railway Co.*, 76 Mo. l. c. 83; *Gee v. Drug Co.*, 105 Mo. App. 27, 78 S. W. 288; *Carter-Montgomerie & Co. v. Steele*, 83 Mo. App. 211, 215; and *May v. Crawford*, 150 Mo. 527, 51 S. W. 693.]

The cases cited by appellant are cases where the question of whether an initiation took place or whether the applicant had never become a member of the society was not involved. In those cases it was admitted that the individual at one time had become a member and was regularly initiated and in good standing, but, through some fault had forfeited his membership. Those cases therefore deal with the forfeiture of a right conceded to have once existed. But in our case the vitality of the certificate is denied from its inception; there is a denial that a certificate on which liability could exist ever passed into the hands of any one having a right to it.

If the position contended for by appellant should be sustained, a certificate in the hands of a person who under uncontradicted evidence obtained it by theft would be some evidence upon which an issue could be put to the jury for them to possibly find that it had

been regularly issued and delivered. The presumption prevails, and should prevail as the decisions declare, that in the absence of evidence the certificate was regularly deposited in proper hands; but such presumption cannot be permitted by a court or jury to contradict the plain, uncontroverted facts as to how it got into the hands of the individual.

There is no proof whatever that the Supreme Lodge ever knew, prior to Gilmore's death, that he had not been initiated and obligated. Upon ascertaining this fact it immediately tendered the initiation fee and payments to the plaintiff which she refused to accept.

Finding no error, the judgment is affirmed. *Robertson, P. J.*, and *Sturgis, J.*, concur.

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C. E. STEPHENS, Appellant, v. HENRY  
REBERET, Respondent.

Springfield Court of Appeals, December 12, 1914.

1. **JUSTICES OF THE PEACE: Jurisdiction: Statutory Provisions.** Plaintiff filed statement and affidavit in replevin before a justice of the peace alleging the value of the property to be \$250 and the damages to be \$50 for its detention. The action was brought in a county having a population of less than 50,000 inhabitants. The justice had no jurisdiction, because under Secs. 7758, 7759, R. S. 1909, in such a county, a justice of the peace in such action has jurisdiction only where the value of the property and the damages are not in excess of \$250.
2. **———: Jurisdiction: How Fixed.** In an action of replevin before a justice of the peace the value of the property as set forth in the statement and affidavit which must be filed fixes the jurisdiction of the justice as to the value. [Sections 7759, 7772, R. S. 1909.]

Appeal from Pemiscot County Circuit Court.—*Hon. Frank Kelly*, Judge.

AFFIRMED.

*Jere E. Gossom* for appellant.

The justice had jurisdiction of the subject-matter; and the plaintiff had a right to waive his claim for damages, thereby giving the justice jurisdiction. *Buckner v. Armour*, 1 Mo. 534; *Best v. Best*, 16 Mo. 530; *Koester v. Lowenhardt*, 160 S. W. 566; *Wells v. Gouveia*, 161 Mo. App. 563; *Cook et al. v. Decker et al.*, 63 Mo. 328. A party may give jurisdiction to a justice of the peace by a voluntary renunciation of a part of his demand. It matters not what way the reduction of the demand is made, so the amount claimed is within the jurisdiction of the justice. *Denny v. Eckelkamp*, 30 Mo. 141; *Wells v. Gouveia*, 161 Mo. App. 565; *Caldwell's Assignee v. Fitzpatrick et al.*, 34 Mo. 276; *Hempeler v. Schneider*, 17 Mo. 258, 260; *Matlack v. Lare*, 32 Mo. 262.

*Ward & Collins* for respondent.

The justice of the peace court, before whom the case was instituted, had no jurisdiction and the circuit court acquired none and properly dismissed appellant's case. Justice courts are of limited and inferior jurisdiction and their jurisdiction must appear on the face of the proceeding, because their power is confined strictly to authority given by the statute. *Smith v. Rock Co.*, 132 Mo. App. 297; *Severn v. Railroad*, 149 Mo. 631; *State ex rel. v. Cotton*, 135 Mo. App. 167; *Grant v. Stubblefield*, 138 Mo. App. 555. Sections 7758 and 7772, R. S. 1909, fix and determine the jurisdiction of the justice of the peace in replevin suits. The amount claimed, value and damages, must not in the aggregate exceed \$250, and the allegation of such value and damage conclusively determines the jurisdiction. *Sonders v. Scott*, 132 Mo. App. 214; *Knocke v. Penny*,



90 Mo. App. 483, 488; Gottschalk v. Klinger, 33 Mo. App. 417; Malone v. Hopkins, 40 Mo. App. 331; Payne v. Weems, 36 Mo. App. 54, 56.

ROBERTSON, P. J.—Plaintiff filed his statement and affidavit in replevin before a justice of the peace to recover possession of a cow and corn in the possession of the defendant. The defendant appeared and filed a motion to dismiss, alleging as his reason therefor that the justice had no jurisdiction. The motion was sustained and later the judgment sustaining it was set aside and thereafter the motion was overruled. The plaintiff then filed an amended statement and affidavit alleging the value of the cow and corn to be \$250 and claimed \$50 as damages for the taking and detention thereof, for all of which he prayed judgment. The cause then proceeded to trial before the justice of the peace and as the result it was found that the value of the property was \$140, and the judgment recites that the plaintiff claimed no damages. The defendant appealed to the circuit court and there renewed his motion to dismiss which was sustained, and the plaintiff has appealed. The plaintiff did not offer to amend his statement in the circuit court and his right to do so is not, therefore, before us for consideration.

At the hearing of the motion plaintiff, over the objection of defendant, offered testimony for the purpose of proving that he in the justice of the peace court, abandoned all claim for damages. Under section 7758, Revised Statutes 1909, the jurisdiction of a justice of the peace in counties such as this county is, having a population less than 50,000 inhabitants, in actions brought for the recovery of personal property, is limited to cases where the value of the property sought to be recovered, and the *damages claimed* for the taking or detention and for all injuries thereto, shall not exceed, in the aggregate, \$250. By section 7772, Revised Statutes 1909, it is expressly provided that the value

of the property, as set forth in the statement and affidavit, fixes the jurisdiction as to the value, and we are governed by the statement and affidavit as to the "damages claimed" by reason of said section 7758. [Payne v. Weems, 36 Mo. App. 54, 56 and 57; Saunders v. Scott, 132 Mo. App. 209, 214, 111 S. W. 874.] These two sections of the Statute are the same as when first enacted (Revised Statutes 1879, sections 2881 and 2895), except that there has been a change as to the amount that may be involved (Laws 1891, pages 174 and 175). Other decisions are cited by respondent as bearing upon this construction of the Statute: Gootschalk v. Klinger, 33 Mo. App. 410, 417; Malone v. Hopkins, 40 Mo. App. 331, 332; Koche v. Perry, 90 Mo. App. 483, 488.

Appellant has cited Best v. Best, 16 Mo. 530; Koesler v. Lowenhardt, 177 Mo. App. 699, 160 S. W. 566; Wells v. De Gouveia, 161 Mo. App. 563, 143 S. W. 517, and Cook v. Decker, 63 Mo. 328, on the question of the right of a plaintiff, where he has brought an action to obtain a money judgment in an amount in excess of the jurisdiction of a justice of the peace, to abandon a portion of his claim and thereby confer jurisdiction. But in all of those cases there was an amendment of the account or statement to bring the demand within the jurisdiction, except in the Best case where it is said "that the justice was authorized to enter a credit on the claim." In the case at bar no one but the plaintiff, or his agent, or attorney could amend. Since in an action of replevin the courts have been holding that section 7758 is as conclusive on the "damages claimed" as is section 7772 on the value of the property and some of these opinions were extant long before the Legislature amended what is now section 7758 we should hesitate to change that rule, because if the Legislature deemed this construction unreasonable it would likely have changed the statute in this respect when

the amendment was made. *State v. Schenk*, 328 Mo. 429, 455, 142 S. W. 263.

The "sum demanded" under section 7395, Revised Statutes 1909, conferring jurisdiction where a money judgment is sought, differs very materially from an action in replevin where, under section 7759, the plaintiff must accompany his statement with an affidavit. In the case at bar the plaintiff, in the face of the motion to dismiss, amended his statement so that the justice of the peace had no jurisdiction and we can see no equity in his claim that he, as a matter of fact, intended to and did waive the damages.

The judgment is affirmed. *Sturgis and Farrington, JJ.*, concur.

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OBIE BLEDSOE, by B. F. BLEDSOE, his next friend,  
Respondent, v. THOS. H. WEST, W. C. NIXON,  
and W. B. BIDDLE, Receivers of ST. LOUIS and  
SAN FRANCISCO RAILROAD COMPANY,  
Appellants.

Springfield Court of Appeals, December 12, 1914.

1. **CARRIERS: Assault by Station Agent: Scope of Employment.** Action by infant for damages on account of an assault committed on him by defendant's ticket agent. Plaintiff purchased a ticket from the agent at defendants' station and was endeavoring to induce agent to return him the proper change when he was assaulted by the agent. The assault was committed while the agent was acting within the scope of his employment and defendant was liable for same.
2. ———: **Passenger: When Relationship Begins: Purchase of Ticket at Station.** Plaintiff presented himself at defendants' depot expecting to take passage on defendants' train due in a short time. He purchased a ticket and was endeavoring to induce agent to give him his change when the agent assaulted him. Plaintiff was a passenger to whom defendant owed the duty to protect him from unlawful assaults by strangers and employees.

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Bledsoe v. West.

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3. **VERDICT: Binding Effect of.** The finding of a jury on controverted facts is binding on the appellate court.
4. **INSTRUCTIONS: Evidence.** Instructions must be founded on evidence.
5. **———: Not Applicable to Case Made: Properly Refused.** Plaintiff was assaulted by defendants' ticket agent while purchasing a ticket for passage over defendants' record. An instruction to the effect that if the assault grew out of a personal difference and difficulty between plaintiff and defendants' agent, plaintiff could not recover, was properly refused on the ground that it was not applicable to the case made.
6. **DAMAGES: Assault: Excessive Damages.** A boy sixteen years of age was assaulted by defendants' station agent while purchasing a ticket from said agent. Evidence reviewed and circumstances considered. *Held*, that a verdict for a thousand dollars and five hundred dollars punitive damages was excessive as to the actual damages, which is reduced to five hundred dollars. [ROBERTSON, P. J., not agreeing.]

Appeal from Pemiscot County Circuit Court.—Hon.  
*Frank Kelly*, Judge.

**AFFIRMED** (*conditionally*).

*W. F. Evans, Moses Whybark and A. P. Stewart*  
for appellants.

(1) The act of the ticket agent in assaulting plaintiff was not within the scope of his employment, and did not pertain to his particular duties under that employment. *Hartman v. Muehlebach*, 64 Mo. App. 575; *Collette v. Railway*, 107 Mo. App. 711; *Raming v. Railway*, 157 Mo. 477; *Drolshagen v. Railroad*, 186 Mo. 258; *Milton v. Railway*, 193 Mo. 46. (2) The difficulty between plaintiff and the ticket agent was personal, and the assault was brought on by plaintiff's own misconduct; and in such situation the master cannot be held liable. *O'Brien v. Transit Co.*, 185 Mo. 269; *McQuerry v. Railroad*, 117 Mo. App. 255; *Mitchell v. Railroad*, 125 Mo. App. 1. (3) The court erred in refusing to give instruction No. 3 for defendants. Plain-

tiff was not entitled to punitive damages. *Mitchell v. Railways*, 125 Mo. App. 1. (4) The verdict in respect of actual damages is so grossly excessive as to shock the sense of justice, and to show unmistakably that it was the result of prejudice or passion. *Mitchell v. Railway*, 125 Mo. App. 14; *Haynes v. Trenton*, 108 Mo. 134; *Briscoe v. Railway*, 222 Mo. 117-121; *Stoetzele v. Swearingen*, 90 Mo. App. 593; *Marriott v. Railroad*, 142 Mo. App. 202; *Lorton v. Railroad*, 159 Mo. App. 567. (5) Where the verdict bears on its face the impress of passion or prejudice, an appellate court not only has the power, but it is its duty, to order a remittitur, or reverse and remand for new trial. *Taylor v. Railroad*, 185 Mo. 260; *Smoot v. Kansas City*, 194 Mo. 523; *Cook v. Printing Co.*, 227 Mo. 546; *Clifton v. Railroad*, 232 Mo. 715; *Richardson v. Brick Co.*, 122 Mo. App. 532.

*C. G. Shephard* and *Everett Reeves* for respondent.

(1) The carrier is responsible for the malicious and wanton acts of its servants to a passenger, whether done in the line of his employment or not, if done during the discharge of his duty to the master which relates to the passenger. Such a carrier undertakes to protect the passenger against any injury arising from the negligence or willful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. *Flynn v. St. Louis Transit Co.*, 113 Mo. App. 185; *Shelby v. Street Railway Co.*, 141 Mo. App. 514; *Eads v. Street Railway Co.*, 43 Mo. App. 536; *Roberts v. Railroad*, 153 Mo. App. 638; *Tanger v. Railroad*, 83 Mo. App. 28; *McLain v. Railroad*, 131 Mo. App. 733; *Keen v. Railroad*, 129 Mo. App. 301; *Farber v. Railroad*, 116 Mo. 81. (2) The relation of carrier and passenger existed between plaintiff and the railroad company at the time plaintiff was as-

saulted. One who in good faith applies to an agent for a ticket, whether he actually buys the ticket or not, is a passenger, and is entitled to protection as a passenger before getting on the train; *a fortiori*, the relation of carrier and passenger existed between the respondent and appellants, because the respondent had actually purchased, or was in the act of purchasing, his ticket at the time he was assaulted by appellants' servant. *Albin v. Railroad*, 103 Mo. App. 308; 5 Am. & Eng. Ency. of Law (2 Ed.), p. 490; *Fisk v. Railroad*, 68 Wis. 469; *Donavon v. Railroad*, 65 Conn. 201; *Gardner v. Railroad*, 51 Conn. 143; *Railroad v. Divinney*, 66 Kan. 776; *Railroad v. Nichols*, 8 Kan. 505; *Gordon v. Railroad*, 40 Barb. (N. Y.) 546; *Eaton v. Railroad*, 57 N. Y. 382; *Carpenter v. Railroad*, 97 N. Y. 494; *Buffet v. Railroad*, 40 N. Y. 168; *Poucher v. Railroad*, 49 N. Y. 263; *Merrill v. Railroad*, 139 Mass. 238; *Warren v. Railroad*, 8 Allen (Mass.) 227; *Hansley v. Railroad*, 115 N. C. 602; *Railroad v. Galliher*, 89 Va. 639; *Railroad v. Rector*, 104 Ill. 296; *Railroad v. O'Keefe*, 168 Ill. 115; *Bricker v. Railroad*, 132 Pa. St. 1; *Udell v. Railroad*, 152 Ind. 507; *Allender v. Railroad*, 37 Iowa, 264; *Railroad v. Messino*, 1 Sneed (Tenn.) 220; *Railroad v. State*, 63 Md. 135; *Railroad v. Best*, 66 Tex. 116; *Grimes v. Pennsylvania Co.*, 36 Fed. Rep. 72. (3) The difficulty between plaintiff and the ticket agent was not personal in a legal sense; the act of assaulting the plaintiff was "done during the course of the discharge by the agent of his duty to the master which relates to the passenger," and it makes no difference whether or not the act of assault was in the line of the agent's employment. See authorities under (1) and (2). (4) The court properly refused instruction No. 3 offered by defendants for the reason punitive damages were proper under the facts in this case. *Haehl v. Railroad*, 119 Mo. 325; *Hedge v. Railroad*, 164 Mo. App. 291; *Tanger v. Railroad*, 85 Mo. App. 28; *Shelby v. Street Railway Co.*, 141 Mo. App. 514. (5) The ver-

dict of the jury in respect of actual damages is not excessive. *Hedge v. Railroad*, 164 Mo. App. 291; *Shelby v. Street Railway Co.*, 141 Mo. App. 514; *Sampson v. Railroad*, 156 Mo. App. 419; *Moudy v. St. Louis D. B. & P. Co.*, 149 Mo. App. 413; *Saller v. Friedman Bros. Shoe Co.*, 130 Mo. App. 712; *Dean v. Railroad*, 229 Mo. 425; *Richardson v. Railroad*, 223 Mo. 325.

ROBERTSON, P. J.—This action, against the receivers of the St. Louis and San Francisco Railroad Company, was brought to recover actual and punitive damages for an assault made upon plaintiff by defendants' ticket agent at Caruthersville. This appeal is by defendants from the result of the second trial in which a judgment was obtained by plaintiff for \$1000 actual and \$500 punitive damages. The first trial resulted in a judgment for \$500 actual and \$500 punitive damages. Both trials were to a jury and the court granted a new trial as to the first verdict on the ground that it was excessive. Whether the actual or punitive damages, or both, were considered excessive is not disclosed. The same judge who sustained the motion for a new trial as to the first verdict passed on and overruled a similar motion as to the verdict here involved.

The plaintiff, a small boy, sixteen years of age went to the defendants' depot in Caruthersville ten or fifteen minutes before train time for the purpose of taking passage on defendants' train to Holland. He went to the ticket window, called for and was delivered a ticket to that point by the man in charge. Plaintiff gave the agent fifty cents, the fare being thirty-eight cents. Plaintiff stood there a short time and remarked to the agent: "Say, partner, you forgot to give me my change." The agent replied: "I haven't got no pennies." The plaintiff waited a short time and then said: "Well, give me my dime then." The agent then retorted: "You heard what I said" and threw a metal stamp, used for stamping tickets, at plaintiff striking

him on the head. The agent then picked up an inkstand as if to throw that, but on the suggestion of some one desisted. The testimony of the defendants' witnesses was to the effect that plaintiff used abusive language and thereby provoked the assault, but that question was submitted to the jury and found adversely to defendants.

The plaintiff pleads the facts as above stated and alleges that at said time the agent was acting within the line and scope of his employment.

The errors assigned are refusal to direct a verdict for defendant; giving and refusing instructions and excessive verdict.

It is said that the peremptory instruction should have been given (a) because the agent in making the assault "was not within the scope of his employment, and did not pertain to his particular duties under the employment," and (b) the difficulty was personal to the agent and was brought on by plaintiff's own misconduct.

It was the duty of the agent to sell tickets, collect the price therefor and return change received in so doing. In these transactions, and in baffling the plaintiff in his effort to secure his change, he was acting within the scope of his employment, and if as an incident thereto and a result thereof he committed a tort the master is liable. [Shamp v. Lambert, 142 Mo. App. 567, 574, 121 S. W. 770; Bouillon v. Laclede Gas Company, 148 Mo. App. 462, 473, 129 S. W. 401; Chandler v. Gloyd, 217 Mo. 394, 412, 116 S. W. 1073.]

Another valid reason for refusing the peremptory instruction is that the plaintiff assumed a burden greater than was necessary on his part. The plaintiff became a passenger when he went to the depot to take passage on defendants' train (Albin v. Chicago, Rock Island & Pacific Railway Co., 103 Mo. App. 308, 316, 77 S. W. 153) and, therefore, the defendants owed him



the duty of protecting him from unlawful assaults by strangers and its employees. [Shelby v. Metropolitan St. Ry. Co., 141 Mo. App. 514, 517, 125 S. W. 1189; Tanger v. Southwest Mo. Ry. Co., 85 Mo. App. 28, 31; Keen v. St. Louis, I. M. & S. R. Co., 129 Mo. App. 301, 307, 108 S. W. 1125; Farber v. Mo. Pac. Ry. Co., 116 Mo. 81, 91, 22 S. W. 613.] A sufficient answer to the second reason, (b), urged for the giving of the peremptory instruction is that the jury found the assumed fact therein stated against defendants.

The defendant complains of the refusal of the court to give an instruction to the effect that if the assault grew out of a personal difficulty between the agent and plaintiff that then he could not recover. The instruction was properly refused because it is shown by all of the testimony that it grew out of the business of the sale of a ticket, as above stated, and also the same hypothesis is included in an instruction given at the request of the defendants.

Defendants complain of the refusal of an instruction asked that stated plaintiff should not recover punitive damages. This, it is stated in the brief, should have been given because plaintiff used insulting language in his controversy with the agent, but all of his witnesses testified he did not, and the jury so found under an instruction given at the request of defendant. It was not error to refuse this instruction.

Lastly, it is said the verdict for actual damages is excessive. A gash about two inches in length was cut on plaintiff's head to the skull. He and his father testified that he had been unable to work; that he was nervous and could not sleep as before the injury. The doctor who first dressed the wound, called by defendants as a witness, testified that such a lick as this might result as plaintiff testified that it had. This doctor also said that an internal injury might be caused without a break of the skin and that complications might arise later that were not indicated soon after the injury.

Defendants cite, in support of this contention (*Brisco v. Metropolitan St. Ry. Co.*, 222 Mo. 104, 117-121, 120 S. W. 1162), where the plaintiff received a slight cut on the chin and other alleged injuries the court was inclined to think were feigned, yet he was required to reduce his judgment to only \$3000. An examination of the cases of *Matriott v. Mo. Pac. Ry.*, 142 Mo. App. 199, 203, 126 S. W. 213; *Lorton v. Wabash Ry. Co.*, 159 Mo. App. 559, 567, 414 S. W. 478, cited by appellants will disclose that the amount to which the judgments were there reduced then exceeded in amount the sum covered here and the injuries were probably less than in this case. The verdict in this case is not, in my opinion, so excessive as to require any interference therewith (*Dean v. Wabash Railroad*, 229 Mo. 425, 457 and 458, 129 S. W. 953; *Sampson v. St. Louis and San Francisco Ry. Co.*, 156 Mo. App. 419, 138 S. W. 98; *Moudy v. St. Louis Dressed Beef & Provision Co.*, 149 Mo. App. 413, 130 S. W. 476) and that it should be unconditionally affirmed, but as the majority of the court entertain a different view of this phase of the case, as stated in a separate opinion by *Farrington* and *Sturgis, JJ.*, the judgment will be affirmed if the plaintiff, within ten days after this date, will remit \$500 of the actual damages allowed him; otherwise the judgment will be reversed and the cause remanded.

*Farrington* and *Sturgis, JJ.*, concur, except as to the last paragraph relating to damages, and file a separate opinion.

### SEPARATE OPINION.

FARRINGTON and STURGIS, JJ.—We concur in the foregoing opinion, except as to the last paragraph and think that the verdict of the jury is excessive and that plaintiff should be required to remit the actual damages to an amount not exceeding \$500.

As stated, the trial court set aside the first verdict allowing \$500 actual and \$500 punitive damages as being excessive. It was stated at the argument that the trial judge refused to set aside the present verdict, though larger than the first one, on the ground that in setting aside the first verdict as being excessive he did so because it was against the weight of the evidence as to the amount and that the trial court was not allowed to grant a new trial a second time because the verdict is against the weight of the evidence. By reference to *Chouquette v. So. E. R. Co.*, 152 Mo. 257, 266, 53 S. W. 897, and cases there cited, it is held that in setting aside a verdict because of being excessive or inadequate the court does not necessarily do so because against the weight of the evidence, but because the verdict is the result of passion or prejudice, or misconduct of the jury.

The two trials were only a few months apart. The evidence as to plaintiff's injuries is practically the same on the second trial as on the first. There is nothing in the evidence to show any new developments in the injuries, or any reason whatever for saying that the injuries were worse at the second trial than at the first. The plaintiff had received no medical attention or examination during the interval. The two physicians who testified had the same knowledge of his injuries at the first trial as at the second. Neither plaintiff nor his father claimed that any new symptoms had developed or that he was in any worse condition during the last two or three months than he was before. The physician who first examined him and dressed his wound testified positively that he made a careful examination and that the wound was only a flesh wound and no injury to the skull or brain resulted. The other physician dressed his wound four or five times, found nothing to indicate that it was more than a flesh wound, said that it healed rapidly and after ten days or two weeks the plaintiff received no medical attention what-

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ever. The blow did not knock plaintiff down and he stood around the depot four or five minutes, walked out the door alone and then went with a companion up town to have the wound dressed. He returned to the train and went home without any assistance. There is no claim for loss of wages. The injury occurred in July and the plaintiff helped in gathering the cotton crop in September and October, and then attended school during the winter. He increased in weight from the time of his injury to the second trial, about eight months, some thirteen or fourteen pounds. The trial court did not submit the case on the measure of damages so as to allow the jury to find anything for permanent injury or future pain or suffering. This was correct because the evidence did not justify any such submission. The case was correctly tried on the theory that whatever injuries plaintiff had received were cured and that his pain and suffering was in the past.

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**N. B. RUTHERFORD, Administratrix of the estate of  
B. F. RUTHERFORD, Deceased, Appellant, v.  
T. G. SAMPLE, Respondent.**

**Springfield Court of Appeals, December 12, 1914.**

- 1. PLEADINGS AND JUDGMENT:** Judgment In Equity Need not Follow Pleadings Absolutely. Though the relief granted may be somewhat different from the specific relief sought, it may be given plaintiff if the petition justifies and plaintiff is entitled to same.
- 2. INSURANCE:** Insurable Interest. A party has no right to take and collect a greater amount of insurance interest on another's property than the value of his own interest.
- 3. INSURANCE:** On Mortgaged Property: Procured by Mortgagee for Mortgagor: Proceeds. A mortgagee did not insure his own interest but took out insurance for another at the

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expense of the mortgagor. Upon collecting the policy he was duty bound to account to the mortgagor for the proceeds.

4. **MORTGAGES: Credits to be Given: What Included.** A beneficiary under a deed of trust purchased a special tax bill against the property, paid the taxes and insurance. The buildings burned and he collected insurance thereon. He was bound to credit his bid at the foreclosure sale under the deed on the costs of the sale and on payments made by him and if there was any balance it should have been credited on the note. He should also have credited on the note a sufficient amount of the insurance collected to have paid said note in full and the balance should have been paid to the grantor.

Appeal from Pemiscot County Circuit Court.—*Hon. Frank Kelly*, Judge.

REVERSED AND REMANDED (*with directions*).

*Duncan & McCarty* and *J. R. Brewer* for appellant.

*Jere S. Gossom* for respondent.

ROBERTSON, P. J.—B. F. Rutherford, being the owner of a lot in the city of Caruthersville executed, with his wife, under date of December 19, 1908, to one Sam Jeffress, as trustee, a deed of trust thereon to secure the payment of his note for \$500 of even date therewith, to the defendant, due one year after its date, providing for interest at the rate of eight per cent per annum, compounded annually if not so paid. Only one year's interest was paid on this, presumably the interest for the first year. A sidewalk was built along this property, a special tax bill issued therefor, to D. E. Greene, suit brought thereon, against Rutherford and defendant, judgment obtained, special execution issued, the property advertised and at the sale on July 19, 1911, it was knocked off to W. R. Lacy on his bid of \$350 or \$375. The sheriff's deed was not executed until March 7, 1913, more than two months after

the suit at bar was commenced and after the term of office of the then sheriff had expired. The sheriff's deed was made to the defendant. After this sale the defendant had the dwelling house on the lot, then occupied by Rutherford as his home, insured against loss by fire, in defendant's name as owner, for the sum of \$1000. The defendant caused the property to be advertised for sale under the deed of trust for January 2, 1912. At about four o'clock on the morning of the day of the sale the house burned; the sale was had, the defendant bid thereat and the property was sold to him for \$418 and on February 1, 1912, he received the trustee's deed. Thereafter the defendant collected about \$950 from the insurance company for the loss of said building. Rutherford and Lacy testified that it was arranged between them that Rutherford should have the property released for the claim of the special tax bill upon Rutherford paying him the amount of his judgment and costs, all amounting to \$181.67. Lacy and Rutherford both testified that the sheriff was directed to make a deed to Rutherford. Rutherford not having the money with which to settle with Lacy arranged with defendant to make the payment, which defendant did, and the sheriff testified that Rutherford directed the deed to be made to the defendant. No part of Lacy's bid was credited on the note. The sheriff testified that he *thought* he took a receipt from Rutherford for the difference between the amount that was due Lacy on his tax bill, including the court costs, and the amount of the bid, but did not produce the receipt at the trial. Defendant insists that he made the arrangement with the holder of the tax bill for the settlement of the claim and was implicated in no way with Rutherford. The insurance agent testified that he solicited Rutherford for insurance on the building but that Rutherford told him that defendant owned the property, "or words to that effect; he said if it was insured, Mr. Semple would have to insure it." De-

fendant testified that when the insurance was adjusted that Rutherford disclaimed any interest in the property, and the insurance agent testified that he did not remember anything of the kind being stated by Rutherford. About two months before the sale under the deed of trust the defendant wrote to Rutherford as follows:

“Mr. Ben Rutherford: Dear Sir. Now I have turned that over to the Bank of Caruthersville. I told you I would give you two months and you told me if I would wait one more month and if you did not sell the place you would turn it over to me. Now you are wanting to wait until the first. It would be the same then. I offered you \$200 last summer and now you have fooled around and the place will be sold. I told Dave Huffman to advertise the place if you did not bring up my part. I could have made some money out of the money I paid out to Dennis Greene and others. Ben, you have been treated as well as I could. Let me know. I told Dave that if you wanted 180 dollars and give possession at once, I would take the place, that was the best I would do after waiting and if you did not want to do that to have the place sold let it bring what it would.

“This is the last time I expect to wait. If you had paid up the interest and settled off the sidewalk business I would have waited, but it is all up now.

“T. G. SAMPLE.”

The testimony discloses that at the time the deed of trust was given Rutherford had insurance on the house and that a rider was put on the policy to protect defendant. Defendant testified that he went to Rutherford after the execution sale and tried to get him to have the property insured. Rutherford, who was about fifty years of age, and in poor health moved to Kentucky after the house burned and after this suit was brought died, and the suit has been revived in the name of his surviving wife as administratrix of his estate. Before his death his deposition had been

taken and was used at the trial. This action is brought seeking an accounting and the petition after alleging the facts prays for general relief. Several witnesses testified, and were uncontradicted, that the value of the property in November, 1911, was \$1500. The judgment of the circuit court was for defendant and plaintiff has appealed.

While it is difficult to ascertain with certainty the exact theory on which the case was disposed of below and is presented here (the facts were all developed without objection), yet as the petition justifies it we shall dispose of the case according to the equities of the parties, although the relief granted may be somewhat different from the specific relief sought. [Phillips v. Jackson, 240 Mo. 310, 336, 144 S. W. 112.]

The testimony, under the situation of the parties as existing when the execution sale was had, leads to the irresistible conclusion that the defendant, when he paid Lacy intended it only as a payment to protect his security as beneficiary under the deed of trust, as is done by a mortgagee in the payment of general taxes. His statements in the letter to Rutherford, his declared effort to have Rutherford secure insurance and his conduct in not having the deed made to him until after this suit was brought conclusively show this. And why should he cause his property to be advertised and sold under the deed of trust? Whether the fact that the sale to Lacy, and his direction to make the deed to defendant, assuming that he gave such orders, were sufficient to give validity to such a conveyance, is unnecessary to decide, as it is evident defendant desired no such conveyance, except as a weapon to use in this suit.

The only troublesome question in this case is as to the insurance money. If the defendant insured his own interest in the lot without any agreement between him and Rutherford, then plaintiff is not entitled to any of the proceeds of the insurance; but if defendant ar-



ranged with Rutherford for the insurance at the charge of Rutherford then plaintiff is entitled to have an account taken of the proceeds. [Dick v. Franklin Fire Insurance Company, 10 Mo. App. 376, 385; Same case, 81 Mo. 103; McDowell v. Morath, 64 Mo. App. 290, 297.] It then became necessary to determine if there was an arrangement between defendant and Rutherford whereby defendant was to procure this insurance at the charge of Rutherford. We hold there was. Rutherford testified that he arranged with defendant for him to procure the insurance in his (Rutherford's) name and charge him with the premium and that defendant afterwards told him it was \$9; that he (Rutherford) shortly thereafter learned that the policy was issued to defendant and upon inquiring why this was done defendant said "it would be all right, the most of it was coming to him." This conversation the defendant did not deny. Defendant admits he went to Rutherford to try to get him to insure the property. The testimony of the insurance agent does not aid defendant. The agent, as above quoted, said Rutherford told him that "if it was insured, Mr. Sample would have to insure it." This rather corroborates Rutherford, because he said he did not have the money to pay for the insurance and had arranged with defendant therefor. Another persuasive reason for upholding this theory is that defendant had no right to take and collect a greater amount of insurance than the value of his interest (Dick case, *supra*, at page 385), which was what Rutherford owed him, and to hold that he did otherwise would be to convict him of a wrong and to permit him to take advantage of it.

The situation, then, at the date of and prior to the sale under the deed of trust, was that Rutherford owed defendant the note, and interest thereon, the amount defendant paid Lacy, the general taxes, if any, paid by defendant on the lot and the amount paid for the insurance, with interest on said sums from date of

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payment at the rate of six per cent per annum up until the date of sale. At the date of and after the sale defendant should have credited his bid on the costs of the sale and on the said payments made by him, and if then there was any balance it should have been credited on the note. After the insurance was collected he should have credited on the note sufficient of the sum realized therefrom to pay the note in full and paid the balance to Rutherford. [Curtis v. Moore, 162 Mo. 442, 454, 63 S. W. 80.] His failure to do this rendered him liable to plaintiff for said balance with interest at six per cent per annum from the date of Rutherford's demand, which defendant did not deny, February, 1912, say March 1, 1912.

The judgment is reversed and the cause remanded with directions to the trial court to take an accounting as above indicated and to enter judgment for plaintiff for whatever sum is found to be due as a result thereof. *Farrington and Sturgis, JJ.*, concur.

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JOSEPH RUDICILE, Respondent, v. MERL C.  
BARR, Appellant.

St. Louis Court of Appeals, January 5, 1915.

1. **DOGS: Property: Right to Kill Dog.** Dogs are property, and no one has a right to kill a dog belonging to another, although found on the slayer's premises, except for just cause.
2. ———: **Right to Kill Dog Chasing Sheep: Statute.** Under Sec. 856, R. S. 1909, one may kill a dog not in the owner's inclosure, if discovered in the act of killing, wounding, or chasing sheep, or under such circumstances as to satisfactorily show that it had been recently engaged in killing or chasing sheep or other domestic animals.
3. ———: ———: **Sufficiency of Evidence.** In an action for shooting plaintiff's dogs while on defendant's premises, *held*, under the evidence, that whether the dogs were, or had been,

just prior to the shooting, chasing defendant's sheep, so as to justify the shooting, under Sec. 856, R. S. 1909, was a question for the jury.

4. ———: ———: Instructions. In an action for shooting plaintiff's dogs while on defendant's premises, defended on the theory that the shooting was justified, under Sec. 856, R. S. 1909, because the dogs had been chasing defendant's sheep, held that the instructions given for plaintiff were free from error.
5. APPELLATE PRACTICE: Review: Assignments of Error. A ruling which is not assigned as error is not properly before the appellate court for consideration, although complaint thereof is made in the written argument filed by appellant.

Appeal from Knox Circuit Court.—*Hon. Charles D. Stewart*, Judge.

**AFFIRMED.**

*F. H. McCullough* for appellant.

If any person shall discover any dog or dogs in the act of killing, wounding, or chasing sheep in any portion of this State, or shall discover any dog or dogs under such circumstances as to satisfactorily show that such dog or dogs were, or have been recently engaged in killing or chasing sheep or other domestic animal, or animals, such person is authorized to immediately pursue and kill such dog or dogs; provided, however, that such dog or dogs shall not be killed in any enclosure belonging to, or being in the lawful possession of the owner of such dog or dogs. Sec. 856, Rev. Stat. of Mo. 1909; *Reed v. Goldneck*, 112 Mo. App. 310; *Sims v. Hall*, 135 Mo. App. 603; *Ewalt v. Garnett*, 163 S. W. 943.

*J. C. Dorian, C. R. Fowler and F. E. Robinson* for respondent.

Where plaintiff's instructions are correct and defendant's are in conflict with them, and the defendant

appeals, then appellant is in no position to complain as the conflict in the instructions, because if error, it was self invited. *Baker v. Railroad*, 122 Mo. 533; *Hohn v. Dawson*, 134 Mo. 581; *Christian v. Ins. Co.*, 143 Mo. 460; *Sprague v. Sea*, 152 Mo. 327; *Russell v. Railroad*, 70 Mo. App. 88.

ALLEN, J.—Plaintiff sues for the reasonable value of two fox hounds alleged to have been shot and killed by the defendant while they were chasing a fox through defendant's premises. The answer denies the allegations of the petition, and avers that defendant found the dogs upon his premises, in the act of chasing his sheep, and shot them in order to protect his sheep. There was a verdict and judgment for plaintiff in the sum of \$26, and the case is here upon the defendant's appeal.

It is urged that the court should have sustained defendant's demurrer to the evidence; but we think that the court did not err in this regard. Plaintiff's testimony is to the effect that on the morning in question he let these dogs out to hunt; that they started a fox which they followed in chase in the direction in which defendant's farm lay; that he returned home, and later in the day, having learned that the dogs had been shot, went to see the defendant, and asked him what damage the dogs had done, and why he had shot them, and that defendant said that he did not know that the dogs had done any damage, but that they had scared his sheep; and that defendant further stated that the dogs were "barking on a track" when he shot them. Plaintiff's version of this conversation is very closely corroborated by the testimony of a witness who overheard the same.

The testimony of other witnesses for plaintiff, who heard the dogs upon the chase, before and shortly after they entered defendant's pasture, and who heard the shooting, tends to show that the dogs were killed

while in close pursuit of a fox, soon after they entered defendant's pasture.

The following notice, signed by defendant and some of his neighbors and published in a local newspaper, was introduced in evidence, viz.: "Hunters and all parties with dogs are hereby notified to keep off our premises. Further, all dogs seen on said premises will be shot without further notice."

Defendant's testimony is to the effect that the dogs were chasing his sheep when he shot them. He stated that he told plaintiff this when the latter asked him why he shot the dogs.

It is well settled that dogs are property; and that no one has the right to kill a dog belonging to another, though found upon the slayer's premises, except for just cause. [See *Reed v. Goldneck*, 112 Mo. App. 310, 86 S. W. 1104.] Under section 856, Revised Statutes 1909, one may kill a dog, not in the owner's enclosure, if he discovers such dog in the act of killing, wounding or chasing sheep, or under such circumstances as to satisfactorily show that the dog had been recently engaged in killing or chasing sheep or other domestic animals. This statute has more than once been before this court. [See *Reed v. Goldneck*, *supra*; *Sims v. Hall*, 135 Mo. App. 603, 117 S. W. 103; *Ewalt v. Garnett*, 180 Mo. App. 614, 163 S. W. 943.] Under the statute the defendant attempted to justify his act of killing plaintiff's dogs, by averring that they were at the time engaged in chasing his sheep; and such is defendant's testimony. If true, this is a complete defense. [See authorities, *supra*.] However, it cannot be said, as contended by appellant, that the evidence conclusively establishes the truth of these averments of the answer. While the defendant was the only eyewitness to the shooting of the dogs, the evidence adduced by plaintiff sufficed to justify the inference that the dogs were shot merely because they came

upon defendant's premises, without more. The case was clearly one for the jury.

There are four assignments of error made, but in fact they raise nothing more than the one point, viz., that the demurrer to the evidence should have been sustained. No error is assigned to the giving of instructions for plaintiff. Some complaint is made on this score in the argument contained in appellant's brief. No such question is properly before us; but we may say that an examination of all of the instructions has convinced us that, taken as a whole, the defendant has no just ground to complain thereof.

The judgment is therefore affirmed. *Reynolds, P. J., and Nortoni, J., concur.*

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JOHN E. BISHOP et al., Respondents, v. GEORGE  
B. VAUGHAN, Appellant.

St. Louis Court of Appeals, January 5, 1915.

1. **ATTORNEY AND CLIENT: Extra Services: Validity of Contract for Additional Compensation.** The contract of an attorney to render professional services for a fixed amount covers all services which are ordinarily or necessarily incident to the proper performance of the duties so undertaken by him, and for such services he can recover no extra compensation; but such a contract does not preclude him from recovering extra compensation for services rendered, with the express or implied consent of the client, which were not contemplated when the contract was made.
2. ———: ———: ———. Where an attorney agreed to prosecute a claim for a retainer and a certain percentage of the recovery, a subsequent agreement between him and his client, whereby he was to be paid an additional amount for attendance at the taking of depositions in a distant State, which work was not contemplated when the original contract was made, was valid.

Appeal from St. Louis County Circuit Court.—*Hon.  
G. A. Wurdeman, Judge.*

**AFFIRMED.**

*Henry B. Davis, Charles Erd and Carlisle Durfee*  
for appellant.

(1) When a contract is entered into between attorney and client, at the inception of the relationship, and proceedings are instituted, any subsequent contract for additional compensation to the attorney for services with respect to the subject-matter of such proceedings, is against public policy and void. And the courts, in such cases, will not inquire into the reasonableness of the subsequent contract for additional compensation, but on considerations of public policy, without entering into the means used to obtain the additional compensation, or the character of the parties, but merely upon the fact of the relation of attorney and client, will not suffer such contracts to stand. *Lacatt v. Sallee*, 29 Am. Dec. 249; *Thomas v. Turner's Admr.*, 87 Va. 1; *Carlton v. Thurston*, D. C., 10 Weekly Law Bulletin 294; *Montesquieu v. Sandys*, 18 Ves. 312; *Newman v. Payne*, 3 Ves. Jr. 200; *Walmsley v. Booth*, 2 Atk. 329; *Weeks on Attorneys*, Sec. 268 and note; 2 *Thornton on Attorneys at Law*, p. 767, Par. 440; *Waterbury v. City of Laredo*, 68 Tex. 565. (2) After the relationship is established, a contract between attorney and client for compensation being void, the attorney can only recover on a *quantum meruit*. See cases cited, *supra*. (3) Even a contract entered into by an attorney and client, at the inception of the relationship, will be scrutinized by a court, and the burden of proving its reasonableness is on the attorney. See cases cited, *supra*.

*Harry A. Frank and Albert E. Hausman* for respondents.

The fact that an attorney performed services under a contract, wherein the amount of compensation to

be received by him was fixed, does not preclude him from recovering for services which were not contemplated by the contract of employment. 2 Thornton on Attorneys, p. 768, par. 441; 4 Cyc. 988; 3 American & English (2 Ed.), p. 443; *Barcus v. Sherwood*, 136 Fed. 184; *Sanders v. Seelye*, 128 Ill. 631; *Singer et al. v. Steele*, 125 Ill. 426; *U. S. Mortgage Co. v. Henderson*, 111 Ind. 24; *Pike, Admr., v. Ziegler*, 4 Kulp, 441; *Allen v. Baker*, 60 N. Y. S. 472; *Haines et al. v. Wilson*, 85 S. C. 338; *Isham v. Parker*, 3 Wash. 755; *Clarke v. Faver*, 40 S. W. 1009; *Bond et al. v. Sanford*, 134 Mo. App. 477.

ALLEN, J.—Plaintiffs, a firm of attorneys at law in the city of St. Louis, were employed by the defendant in 1904 to prosecute a claim of the latter against a construction company for grading done by the defendant in certain railroad construction work. By the contract of employment, defendant agreed to pay plaintiffs \$100 as a retainer, and as additional compensation ten per cent of whatever might be realized on said claim. Plaintiffs were paid the said retaining fee, and proceeded to prosecute the claim. During the prosecution thereof it became necessary to take the deposition of a witness who had in the meantime removed from this State and resided at San Francisco, California. It appears that the defendant urged that one of the plaintiffs be present in person at the taking of such deposition, and that an agreement was then entered into between plaintiffs and the defendant, whereby defendant agreed to pay plaintiffs five per cent of the amount which might be realized upon the claim, in addition to the ten per cent thereof originally agreed to be paid plaintiffs, and to pay the expense incident thereto, if one of plaintiffs would personally attend the taking of said deposition. And pursuant to the terms of such agreement, one of the



plaintiffs attended the taking of the deposition, which took him from his office for a period of about ten days.

This action is in *quantum meruit* to recover the reasonable value of all of plaintiffs' services rendered in the premises, including the attendance at the taking of the deposition; the expense incident to the latter having been paid by defendant. The cause was referred to a referee, who found that plaintiffs were entitled to five per cent of the amount recovered upon the claim, in addition to the ten per cent originally agreed to be paid them, and recommended judgment in favor of plaintiffs for fifteen per cent of the said amount recovered. The trial court entered judgment in accordance with the findings and recommendation of the referee, and the defendant appealed.

The question in dispute pertains solely to plaintiff's right to recover the additional five per cent for services rendered in the taking of the deposition at San Francisco. The referee found that the extra time and labor involved therein was not contemplated by either party at the time of the making of the original contract of employment, and was not included within its terms; and that defendant not only agreed to pay the said additional compensation therefor, but insisted that one of the plaintiffs personally attend the taking of the deposition. And on behalf of defendant it was conceded, in argument *ore tenus*, that respondents acted in the utmost good faith throughout the entire transaction, and that the subsequent agreement was made at appellant's solicitation. Appellant's contention, however, is that, regardless of all this, the agreement for extra compensation is void; that the making of such a contract between an attorney and his client, during the progress of litigation, for extra compensation for services rendered with respect to the matter in suit, is against public policy, and such contract necessarily void. And in support of this authorities

are cited, which will doubtless be found in the brief of appellant accompanying the reported opinion herein. But we cannot agree with counsel in this contention.

While it is true that the contract of an attorney to render professional services for a fixed amount covers all services which are ordinarily or necessarily incident to the proper performance of the duties so undertaken by him, and that for such services he can recover no extra compensation (2 Thornton, Attorneys at Law, Sec. 440), the mere fact that an attorney at law performs services under a contract fixing the amount of compensation to be received by him does not preclude him from recovering extra compensation for services rendered, with the express or implied assent of his client, which were not contemplated by the contract of employment. [See 2 Thornton, Attorneys at Law, Sec. 441; 4 Cyc. 988, 989; *Barcus v. Sherwood*, 136 Fed. Rep. 184; *Singer, Nimick & Co. v. Steel*, 125 Ills. 426; *Clarke v. Faver*, 40 S. W. 1009; *Allen v. Baker*, 60 N. Y. Supp. 472; *Isham v. Parker*, 3 Washington 755.]

Upon the undisputed facts in evidence, we think that plaintiffs' right to recover the additional compensation which defendant contracted to pay them is quite clear. The mere existence of the original contract of employment and of the relation of attorney and client thereby created did not render the parties incapable of contracting with each other with respect to services not contemplated by the former contract. It would be a strange doctrine indeed that would deny an attorney a recovery for additional services rendered under such circumstances, and permit his client, who had solicited the rendition thereof and solemnly agreed to pay therefor, to breach his said contract with entire impunity after having received the benefit of the services rendered.

The judgment should be affirmed, and it is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

DON C. MCGOWAN, Respondent, v. CHARLES C.  
GARDNER et al., Appellants.

St. Louis Court of Appeals, January 5, 1915.

1. **APPELLATE PRACTICE: Ruling on Demurrer to Evidence: Prerequisite to Review.** A refusal of the trial court to give an instruction in the nature of a demurrer to the evidence is not reviewable, unless all the evidence adduced is presented to the appellate court.
2. **PLEADING: Petition: Construction After Verdict.** After verdict, the petition is to be more liberally viewed, to the end of making out a cause of action, if such may be done, by fair inference and reasonable intendment.
3. **APPELLATE PRACTICE: Defects in Pleading: Clerical Error.** A statement in a petition which renders it vulnerable to attack as not stating a cause of action cannot be rendered innocuous, on appeal, by a suggestion that it was a clerical error, since the appellate court must pass upon the petition as it finds it.
4. **———: Pleading: Fatally Defective Petition: Waiver of Defects.** A failure of a petition to state facts that are essential to the statement of a cause of action is a matter going to the jurisdiction and necessarily fatal, and hence the defendant is not precluded from complaining of such defect, on appeal, by reason of having tried the case as though the petition were sufficient.
5. **EVIDENCE: Judicial Notice: Election Precincts.** The appellate court cannot judicially know that a ward of a city of the third class constituted one election district.
6. **ELECTIONS: Action Against Judges: Pleading.** In an action against judges of election to recover damages for acts done by them in the discharge of their official duties, the cause of action must be alleged with considerable technical precision.
7. **———: ———: Pleading: Sufficiency of Petition.** In an action against judges of election, for their refusal to allow plaintiff to vote at an election, the petition alleged that defendants were the judges of election of the fourth ward, that plaintiff was "a citizen and resident of said fourth ward," that the city, on a certain date, "held a general election at the various voting precincts in said fourth ward," and that defendant election judges refused to permit plaintiff to vote

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at said election. The petition did not aver that plaintiff was a resident of the voting precinct or election district of the fourth ward in which he offered to vote, nor did it aver that the fourth ward constituted one voting precinct or election district. *Held*, that the petition did not state a cause of action, in view of Art. 8 of the Constitution, which prescribes the qualifications of voters, and Sec. 5800, R. S. 1909, which provides that each voter shall vote in the precinct in which he resides, for the reason that it did not aver that plaintiff offered to vote in the particular precinct or election district in which he resided.

8. ———: ———: **Liability of Judges.** In performing the duties of their office, election judges act in a judicial capacity and cannot be held liable in damages for a mere error of judgment; and hence they are not liable for their refusal, in good faith, to permit a qualified voter to vote, but are liable, in such a case, only where they act maliciously or fraudulently.

Appeal from Knox Circuit Court.—*Hon. Chas. D. Stewart*, Judge.

REVERSED AND REMANDED.

*Millan & Banning, James E. Cooley, James Dorian, P. J. Rieger, J. E. Rieger and A. Doneghy* for appellants.

(1) The petition does not state facts sufficient to constitute a cause of action. *Blair v. Ridgley*, 41 Mo. 182; *Curry v. Cablis*, 37 Mo. 130; *Murphy v. Ramsey*, 114 U. S. 55; *Blanchard v. Stearns*, 5 Metc. 298. (2) The averments that he was legally qualified to vote, all of which was known to defendants, and that they wilfully, maliciously and wrongfully refused to permit him to vote, are all legal conclusions and not warranted by facts stated. *Curry v. Cablis*, 37 Mo. 330; *Blair v. Ridgley*, 41 Mo. 182; *Murphy v. Ramsey*, 114 U. S. 55; *Pearce v. State*, 1 Sneed 63; *Quinn v. State*, 35 Ind. 485. (3) The allegation of a conclusion of law raises no issue, it need not be denied, and its truth is not admitted by demurrer. *Malinkrodt Works v. Nemnich*,

169 Mo. 388. (4) The right to vote is not a natural one, but is conferred by statute. 10th Am. & Eng. Cy. Law (2 Ed.), p. 568; Blair v. Ridgley, 41 Mo. 63. (5) In an action on a statutory right the plaintiff must allege with definiteness and certainty every fact necessary to make out his title. 6 Cy. P. & Practice, page 264; Bliss Code Pldg., sec. 310. (6) The term "residence" as used in the clauses of the Constitutions of the various States defining political rights, is synonymous with "domicil," denoting a permanent dwelling place. 10 Am. and Eng. Cy. Law (2 Ed.), p. 598; State ex rel. Banta, 71 Mo. App. 32; State ex rel. v. Sheperd, 218 Mo. 656. (7) The intention which gives residence is an unconditional intention to stay always. The Venus, 8 Cranch, top page 131, 278; The Venus, 8 Cranch, top page, 121, 290; School District v. Math-erly, 90 Mo. App. 407; Smith v. Croom, 7 Fla. 81; 4 Hun (N. Y.) 487; Bartlett v. Ny, 5 Saund. 44; In re Thompson, 1 Wend. (N. Y.) 43; Hascall v. Hartford, 107 Tenn. 355; Statton v. Brigham, 2 Sneed 420; John-son v. Twenty-one Bales, 13 Fed. Cas. 7, 417; Vandeopol v. O'Hanlan, 53 Iowa, 246; Whicker v. Hume, 7 H. L. Cas. 164. (8) To effect a change of residence both the factum and animus must exist. A new resi-dence is not acquired until there is not only a fixed intention of establishing a permanent abode in some other place, but, also, until this intention has been actually carried out by actual residence there. Boyd's Exrs., 149 S. W. 1022; 14 Cyc. 838; Wyrick v. Wyrick, 162 Mo. App. 723; Mitchell v. U. S., 21 Wall. 352; Lowry v. Bradley, 1 Speers' Eq. (S. C.) 1; 10 Am. & Eng. Cy. Law (2 Ed.), p. 599; Greene v. Beckwith, 38 Mo. 385; State ex rel. Finn, 4 Mo. App. 356; 10 Am. & Eng. Cy. Law (2 Ed.), p. 14. (9) Under section 7 of article 8, Constitution of Missouri, a student must establish his intention to make the seat of learning his place of resi-dence by acts entirely disconnected with or dependent upon his attendance as a student at the place where

the institution of learning is located. The presumption is that he did not intend to fix there permanently. In *re Garvey*, 147 N. Y. 117; In *re Goodman*, 146 N. Y. 284; *Fry's Election Case*, 71 Pa. St. 302; *Saunders v. Getchnell*, 76 Me. 158; *Vandopoel v. O'Hanlan*, 53 Iowa. 246; 10 Am. & Eng. Cy. Law (2 Ed.), 605. (10) The term residence had been defined, by the courts of this state, as a permanent place of abode, prior to the adoption of the Constitution of 1875 prescribing residence as a qualification to vote. *Green v. Eeckwith*, 38 Mo. 385; *Adams' Admr.*, 37 Mo. 197.

*C. E. Murrell, F. H. McCullough and Higbee & Mills* for respondent.

ALLEN, J.—This action was begun in the circuit court of Adair county. A change of venue was granted to the circuit court of Knox county, where the cause was tried before the court and a jury, resulting in a verdict and judgment for plaintiff for the sum of one dollar, and the defendants appeal.

The petition alleges that on Tuesday, April 2, 1912, plaintiff "was a male citizen of the United States, over the age of twenty-one years, and had on said day resided in this State and in the fourth ward of the city of Kirksville, in Adair county, Missouri, more than one year, immediately preceding the election held in the city of Kirksville on said day, and he was on said day a citizen and resident of said fourth ward in said city and legally qualified to vote at said election in said ward, all of which was well known to the defendants; that on said day said city of Kirksville, which is a city of the third class, held a general election at the various voting precincts in said fourth ward, for the election of councilmen in said city, and the defendants and two others were duly appointed and acting judges of election in the fourth ward of said city of Kirks-

ville at said general election; that the defendants were the receiving judges at said election in said ward."

The petition then avers that on said day plaintiff "appeared before the defendants and the other judges at said election in said fourth ward, in said city of Kirksville, and requested of the defendants one ballot of each political party to be voted for at said election; that plaintiff then and there offered to take his corporal oath before the judges of said election that he was then a male citizen over twenty-one years of age, and that he was then a resident of said fourth ward of said city of Kirksville and had been for more than one year immediately preceding said election, but the defendants refused to administer said oath to plaintiff, and wilfully, fraudulently, knowingly, maliciously and corruptly refused to permit plaintiff to cast his ballot for councilmen at said election." And plaintiff prays judgment for \$100 actual damages and \$1000 punitive damages.

To the petition the defendants interposed a demurrer, which was overruled, and thereupon filed their answer, which admits that the city of Kirksville is a city of the third class, that on April 2, 1912, a general election was held in such city, and particularly in the fourth ward thereof, for the election of councilmen, and that defendants and two others were the duly appointed and acting judges at said election, and denies generally the other allegations of the petition.

It is urged here that the petition is fatally lacking in essential averments; and numerous assignments of error are made with respect to the giving and refusing of instructions. It is also urged that the court erred in overruling the demurrer of defendants offered at the close of all the evidence, but since the appellant has not brought the evidence here, there being but a skeleton bill of exceptions before us, we cannot pass judgment upon this assignment of error.

It is said that the petition is fatally defective in that it does not allege facts necessary to show that plaintiff was in fact a qualified voter when he offered to vote upon the occasion in question. It is contended that the averment that plaintiff was "legally qualified to vote at said election" is not the statement of a fact, but a mere legal conclusion of the pleader. This position finds support in the decisions of the Supreme Court of this State in *Blair v. Ridgley et al.*, 41 Mo. 63, l. c. 180, et seq., and *Curry v. Cabliss et al.*, 37 Mo. 330. In each of the cases just cited, however, the question arose upon demurrer to the petition, and not, as here, after verdict, when the petition is to be more liberally viewed and a cause of action may be made out by fair inference and reasonable intendment. It will not be necessary, however, for us to pass upon this question.

Neither shall we decide whether it was necessary, as appellant contends, for plaintiff to aver not only that he was a male citizen of the United States, over twenty-one years of age, and to make the further necessary allegations respecting his residence in the State and city aforesaid (Constitution, article VIII, section 2), but to further aver that he was not an officer, soldier or marine in the regular army or navy of the United States, nor an inmate of any poorhouse or other asylum, nor confined in any public prison, and that he had not been convicted of a felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage. [See sections 8, 10 and 11 of article VIII of the Constitution; section 5800, Revised Statutes 1909.] This question was not passed upon in either *Blair v. Ridgley* or *Curry v. Cabliss*, supra; but it was held in *Murphy v. Ramsey*, 114 U. S. 15 (where there was no general averment that the plaintiff was a legally qualified voter), that a declaration in an action of this character was fatally defective which failed to negative the existence of such facts as



would disqualify the plaintiff as a voter under the organic law in force. But we deem it unnecessary to express any opinion on this subject.

It is urged, among other things, that the petition does not aver that plaintiff offered to vote in the precinct or election district in which he resided at the time, and that the petition for this reason fails to state facts sufficient to constitute a cause of action. It will be noted that the petition avers that plaintiff was, on the day of the aforesaid election, "a citizen and resident of said fourth ward in said city," and that the city on this day held a general election at the various voting precincts in said fourth ward." The petition nowhere avers that plaintiff was a resident of the voting precinct or election district in which he offered to vote. There is no averment that the fourth ward of the city of Kirksville constituted one voting precinct or election district. On the contrary, it is inferentially stated that said fourth ward comprised more than one voting precinct, for it is averred that a general election was held on the day in question "at the various voting precincts in said fourth ward." Respondent asserts that the language of the petition last quoted is clearly a "clerical error," and that it was intended to allege that a general election was held at the various voting precincts in the city of Kirksville, and not in the fourth ward thereof. But we must necessarily take the petition as it appears before us in the abstract.

The further contention of respondent is that the case was tried upon the theory that the fourth ward constituted a single voting precinct, and that appellant should not now be permitted to complain on this score. There is but little in the record which could be said to support this contention; but be this as it may, the want of essential averments in the petition, necessary to the statement of a cause of action, is a matter going to the jurisdiction, and necessarily fatal.

What shall constitute the qualifications of a voter are prescribed by article VIII of the Constitution. These qualifications are reiterated in the statute (section 5800, Revised Statutes 1909), which further provides that "each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides." In the instant case we cannot judicially know that the fourth ward of the city of Kirksville, on April 2, 1912, constituted one election district. If such be true, we cannot take judicial notice of it. It is necessary for plaintiff to allege and prove not only that he possessed all of the qualifications necessary to entitle him to cast his ballot at the aforesaid election, but that he offered to vote in the election district in which he resided, for otherwise no liability whatsoever could attach to the defendants for refusing to permit him to cast his ballot.

In a case of this character, where it is sought to recover damages against judges of election for an act done in the course of the discharge of their official duties, the cause of action is required to be alleged with considerable technical precision. [Blair v. Ridgley, *supra*.] Here not only is a necessary averment lacking, to-wit, that the plaintiff offered to cast his ballot at the voting place in the election district of his residence, but the petition in this respect is not in any manner helped out by any inference to be drawn from other facts pleaded. On the contrary it is at least inferentially stated that there are several voting precincts in the ward in which plaintiff is alleged to have resided. We are therefore of the opinion that the petition is fatally defective on this ground.

In a case of this character there must be proof that the defendants acted maliciously, or fraudulently in refusing to permit the plaintiff to vote. It is a well recognized principle of law that no action will lie against officers of election for refusing to receive a

vote where they are guilty of no malice or fraud, but in good faith exercise their best judgment in the premises, even though a legally qualified elector is thereby deprived of his right to vote. In performing the duties of such an office an election judge acts in a judicial capacity, and upon reason and authority he cannot be held liable for damages for a mere error in judgment. [See *Blake v. Brothers*, 79 Conn. 675; 11 L. R. A. (N. S.) 501, and authorities cited in note.] What the proof shows as to this we know not, since the evidence has not been brought up; but as we have decided to remand the cause, we here refer to the character of proof necessary to sustain a verdict in plaintiff's favor, as a matter to be reckoned with upon a future trial should one be had.

There are questions raised other than those to which we have referred above, but it is not necessary to discuss them.

The judgment is reversed and the cause remanded, with leave to plaintiff to amend his petition if so advised. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

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OUTCAULT ADVERTISING COMPANY, Appellant,  
v. CHARLES M. WILSON, Respondent.

St. Louis Court of Appeals, January 5, 1915.

1. **SALES: Contracts: Acceptance.** An instrument which directed an advertising company to ship to the signer designated advertising material, for a specified compensation, was merely an order, and was not enforceable, in the absence of an acceptance by the company, since, without such acceptance, it lacked mutuality.
2. ———: ———: **Orders: Acceptance.** Where an order for merchandise, signed by one party, is not countermanded, and the other party acts thereon and fully performs, such performance becomes a valid consideration, and relates back to the date of the order, which becomes an enforceable contract.

3. ———: ———: ———: **Revocation.** Where one who signed an order for merchandise notified the seller, before the latter had accepted the order, not to fill it, he was thereafter under no legal duty to accept the goods and pay the price specified in the order, since the order was revocable at any time before it became a contract through being accepted and acted upon by the seller, and the fact that the buyer placed his refusal to accept the goods upon the ground that the seller had first breached the contract was immaterial.
4. **CONTRACTS: Breach: Duty to Minimize Damages.** One party to a contract has no right to proceed to execute it, after he has been notified that the other party has repudiated it, but his remedy is an action for damages for the breach; it being his duty to minimize the damages, and not to increase them by proceeding to perform.

Appeal from Montgomery Circuit Court.—*Hon. James D. Barnett*, Judge.

**AFFIRMED.**

*Warner Lewis* for appellant.

(1) The contract, in the case was complete, between the plaintiff and defendant when signed, delivered and excepted, and the defendant cannot escape his liability for the agreed price and value of the goods purchased, by his refusal to receive them after they arrived at New Florence, on the 27th day of January, 1912. *Price v. Atkinson*, 117 Mo. App. 52. (2) A breach of a contract that does not go to the whole conditions of the contract, will not authorize a rescission of the contract, where such breach can be compensated for in damages; hence the court's instruction No. 4, is misleading and should not have been given to the jury. *Hayden v. Railroad*, 117 Mo. App. 795. (3) The covenants in the contract to pay monthly for one year at the rate of \$2.10 per month and to return cuts at the end of the year are all independent, and a failure of any one does not authorize the rescission of the contract, because it can be compensated in damages; the

same rule applies to both parties. *Turner v. Miller*, 59 Mo. App. 526; *Barthold v. Railroad*, 165 Mo. App. 280. (4) Time of performance is not the essence of the contract, and the defendant was responsible for the delay himself. *Bridge Company v. Corrigan et al.*, 251 Mo. 667.

*E. Rosenberger & Son* for respondent.

(1) The paper writing sued on was not a contract. It was a mere offer on the part of the defendant to hire a certain advertising scheme owned by plaintiff for a stipulated length of time. Before there can be a valid, binding contract, there must not only be an offer on the part of one party, but there must be an unqualified, unconditional acceptance on the part of the other. *Sarran v. Richards*, 151 Mo. App. 660. (2) the alleged contract sued on was unilateral. There was no mutuality of obligation. It laid no binding obligation on appellant to furnish the "ad" cuts. *Iron & Rail Co. v. Railroad*, 148 Mo. App. 173. (3) While time is not usually of the essence of a contract, the parties can make it so, and when they do so agree, they are bound by it. The evidence shows that plaintiff if it accepted defendant's order agreed to furnish him the advertising matter by January 21, 1912. This plaintiff failed to do, and it cannot enforce the alleged contract sued on. *Carrabine & Co. v. Cox*, 136 Mo. App. 370. (4) One party to an executory contract has the power to repudiate it, and the remedy of the other party is an action for damages caused by a breach of the contract. He cannot thereafter, himself, perform and recover on the contract, and a contracting party who has certain things to do under his contract has no right to proceed to execute it after he has been notified that the other party will not stand by the contract, and when he receives notice from the other party repudiating the contract, he is not justified in allow-

ing anything further to be done. Printing & Mfg. Co. v. Cutlery Co., 143 Mo. App. 322. (5) The court committed no error in refusing plaintiff's instructions and the instructions given by the court of its own motion were more favorable to plaintiff than to defendant, and plaintiff is not in a position to complain of said instructions. The court should have declared, as a matter of law, that plaintiff was not entitled to recover.

ALLEN, J.—This is an action to recover the sum of \$109.20 claimed to be due plaintiff corporation under an alleged contract between the parties. The trial, before the court and a jury, resulted in a verdict and judgment for defendant, and plaintiff appeals.

Plaintiff is located in the city of Chicago, and engaged in the advertising business, and defendant is a merchant doing business in New Florence, Missouri. On January 16, 1912, the defendant, at the solicitation of one Elliott, a travelling salesman for plaintiff, signed the following paper, which was forwarded to plaintiff's Chicago office, viz.:

“To Outcault Advertising Co.                      Order No. 876  
508 S. Dearborn St., Chicago, Ill.

Date Jan. 16th, 1912.

Ship us, at our expense, as per samples shown, your Yellow Kid ‘Ad’ Service, to cover a period of One Year, beginning Jan. 21, 1912. This service to consist of: . . . Yellow Kid Souvenir Calendar Post Cards for each month.

. . . front type.

We (or I) agree to pay you net cash monthly, at the rate of \$2.10 per week, for one year, we (or I) to have exclusive right to use the above Yellow Kid ‘Ad.’ Service in our city only, and to hold type and cuts subject to your order when this contract expires.

Failure to pay any installment when due renders full amount of this Contract due.

This contract cannot be cancelled. Ship all at one time if possible.

(Signed) CHAS. M. WILSON.

ELLIOTT, Salesman."

On the following day, to-wit, January 17, 1912, defendant wrote plaintiff, saying that he had been advised that plaintiff's salesman had offered "similar ads" to others at a lower price, and directing defendant not to ship the goods until he had an opportunity to investigate the matter, adding: "Nobody knows better than you whether your salesman is making different prices and if you are don't send me any at all."

Defendant heard nothing from plaintiff either as to the acceptance of the order or in reply to the aforesaid letter. Plaintiff later shipped the articles in question, which, it seems, arrived at the office of an express company in New Florence on January 27, 1912. Defendant refused to receive them, and notified plaintiff to this effect, stating that the goods had not been shipped within the time specified, and that he had made other arrangements for his advertising. And defendant testified that he later reshipped the goods to plaintiff, prepaying the charges therefor.

The cause was submitted to the jury under certain instructions given by the court of its own motion, after all instructions requested by both plaintiff and defendant had been refused. It was submitted upon the theory that the writing signed by defendant constituted a valid and subsisting contract between the parties; that time was not of the essence of the contract, but that plaintiff was entitled to recover the total of all installments, to-wit, \$109.20, if the jury found from the evidence that the advertising matter was shipped to the defendant by plaintiff within a reasonable time.

There are no distinct assignments of error before us; and though we have fully considered the ques-

tions raised by appellant in its brief, it is unnecessary to refer to them in detail.

We think it clear that the paper signed by defendant was in fact nothing but an order, and did not in itself constitute a valid and enforceable contract. It purports upon its face to be merely an order; and no acceptance thereof on the part of plaintiff appears prior to the shipping of the goods in question. It is true that the name "Elliott" (the name of the salesman) appears upon the paper, but there is nothing to indicate that this was intended as an acceptance of the order by plaintiff, binding it to fill the same in the manner and within the time specified. The evidence merely shows that the defendant signed the order and that it was mailed to plaintiff. Upon its face it does not bind plaintiff to do anything, and is lacking in mutuality. Under the circumstances, it seems clear that there was no binding contract originally entered into. [See *Price v. Atkinson*, 117 Mo. App. 52, 94 S. W. 816; *Iron & Rail Co. v. Railroad*, 148 Mo. App. 173, 127 S. W. 623; *Sarran v. Richards*, 151 Mo. App. 656, 132 S. W. 285.]

It is true that where such an order is not countermanded and the other party acts thereupon and fully performs, such performance becomes a valid consideration relating back to the date of the order, and the latter ripens into an enforceable contract. [See *Price v. Atkinson*, *supra*.] In the case before us, however, defendant countermanded the order on the day following its execution; and it appears by plaintiff's own evidence that plaintiff received defendant's letter to this effect before entering upon the performance of the contract on its part. While this letter left the matter open for further negotiations between the parties, it, in effect, notified plaintiff not to ship the goods until advised that defendant was satisfied as to the price, and constituted a present revocation of the or-



der previously mailed. And under the circumstances plaintiff was bound to recognize defendant's right to revoke the order. [See *Price v. Atkinson supra.*]

Defendant was therefore under no legal duty to accept the goods and pay the so-called contract price. And it cannot matter that he placed his refusal so to do upon the ground that plaintiff had first breached the contract, if any existed, by failing to make delivery within the time specified in the order.

It is also quite clear that plaintiff cannot recover in this action for the contract price, even upon the theory that the writing constituted a valid contract between the parties. Assuming the existence of such contract, it was wholly executory when defendant repudiated it. Thereafter, plaintiff could not perform and recover on the contract. One party to a contract has no right to proceed to execute it after he has been notified that the other party thereto has repudiated the contract. [See *Printing & Manufacturing Co. v. Cutlery Co.*, 143 Mo. App. 1. c. 522, and cases cited, 127 S. W. 666.] His remedy is an action for damages for the breach, and his duty is to minimize the damages, and not to increase them by proceeding to perform the contract. [See *Frederick v. Willoughby*, 136 Mo. App. 244, 116 S. W. 1109; *Printing & Manufacturing Co. v. Cutlery Co.*, *supra.*]

It is unnecessary to notice other questions raised. Under the evidence plaintiff was not entitled to recover upon any theory, and the judgment in favor of defendant should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

#### ON MOTION FOR REHEARING.

ALLEN, J.—It is urged that the foregoing opinion is directly in conflict with that of the Springfield Court of Appeals in *Outcault Advertising Company v. Barnes*, 176 Mo. App. 307, 162 S. W. 631, which was

not called to our attention. It is clear, however, that no such conflict exists. In the last-mentioned case defendant signed an order similar to that here involved, and plaintiff by letter accepted and agreed to fill the same. Thereafter defendant wrote plaintiff a letter seeking to cancel the order, but plaintiff's proof showed that the goods had been shipped before the receipt of this letter. For the reasons indicated in the foregoing opinion, a binding contract came into existence; and the case is readily distinguishable from the one before us.

The motion for rehearing is overruled.

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JOHN V. NEBEL, Public Administrator, Appellant,  
v. EDWARD BOCKHORST, Public Administrator,  
et al., Respondents.

St. Louis Court of Appeals, January 5, 1915.

1. **JURISDICTION: Manner of Raising Question: Appellate Practice.** An objection to the trial court's jurisdiction over the subject-matter may be raised at any stage of the proceeding, or may be considered by the appellate court *sua sponte*.
2. **EXECUTORS AND ADMINISTRATORS: Equity: Jurisdiction of Probate Matters.** While a suit in equity may sometimes be maintained in respect to matters which would ordinarily appear to be within the jurisdiction of the probate court, yet this is true only in those rare instances where the provisions of the administration law fail to furnish a complete and adequate remedy in the premises and where relief may be afforded only in a court of purely equitable cognizance.
3. **————: ———: ———: Sale of Land to Pay Legacies.** An application to sell a decedent's real property to pay legacies alleged to have been charged thereon is within the exclusive jurisdiction of the probate court, conferred by Secs. 150, 154, R. S. 1909, subject to the right of appeal to the circuit court, and hence the circuit court has no jurisdiction of a bill in equity for such relief.

Appeal from Warren Circuit Court.—*Hon. James D. Barnett*, Judge.

**AFFIRMED.**

*Robert Walker* for appellant.

(1) All estates, whether by devise or by bequest, are considered vested rather than contingent. The \$1,000 legacy bequeathed to Eliza Sattmann under the fifth paragraph of the last will of Sophie Sattmann was an absolute gift which became vested in the said Eliza on death of the testatrix. *Lich v. Lich*, 158 Mo. App. 418; *Collier's Will*, 40 Mo. 287. (2) And the testatrix dying without leaving any personal property to pay the said legacy, it is presumed that the testatrix intended to and did charge her real estate with the payment of said legacy. *Clotilde v. Lutz*, 157 Mo. 439; *McQueen v. Lilly*, 131 Mo. 9; 19 Am. & Eng. Ency. of Law, p. 1359. (3) And as such a legacy it is transmissible to the legatee's legal representatives. *Woerner's Law of Administration*, sec. 436; *Collier's Will*, 40 Mo. 287, 326. (4) And although the legacy to the said Eliza Sattmann should have been paid by the said Henry Sattmann since the year 1901, when the said Eliza died, limitations do not bar payment now by reason of there having been no administration on the estate of Eliza Sattmann prior hereto. *White v. Blackenblacker*, 115 Mo. App. 722; *McDonald v. Walton*, 1 Mo. 727; *Dillon's Admr.*, 39 Mo. 292. (5) And suit to enforce the payment of such legacy may be brought in circuit court, as is done in this case. *Stephens v. Bernays*, 119 Mo. 143.

*John K. Waring* and *E. Rosenberger & Son* for respondents.

ALLEN, J.—This action was instituted in the circuit court of Warren county by plaintiff, public admin-

istrator of said county, in charge of the estate of Eliza Sattmann, deceased. The defendants are the public administrator of Montgomery county, in charge of the estate of Henry Sattmann, deceased, and the devisees under the will of said Henry Sattmann.

The petition avers that one Sophia Sattmann died in Warren county, Missouri, in 1878, leaving a last will and testament written in the German language, which was duly admitted to probate in said county in the year 1879. The will, translated into English, is set out in full in the petition. By the first four clauses thereof the testatrix bequeathed to four of her children the sum of five dollars each. The fifth clause is as follows:

“Fifth, I give and bequeath to my daughter, Eliza Sattmann, one thousand (\$1,000) dollars; said sum shall remain in the hands of C. Henry Sattmann, without interest, so long as the said Eliza Sattmann stays with him under his care, custody, guardian; in case, however, that Henry Sattmann should not treat his sister Eliza well, and it shall be proved by three neighbors that she cannot stay with him any more, he shall of the aforementioned one thousand dollars pay six (6) per cent interest to the one where she is at, and a complete bed worth forty dollars in cash money.”

By the sixth clause of the will the testatrix devised to her son, C. Henry Sattmann, all of her real estate consisting of two hundred and forty acres of land in Warren county; and her said son, C. Henry Sattmann, is made residuary legatee, and named as executor.

The petition then avers that C. Henry Sattmann resided on the real estate so devised to him until the year 1905, when he removed to the State of Nebraska, where he died testate December 18, 1910, still owning said lands; that his last will and testament was duly admitted to probate in Philmore county, Nebraska, on January 14, 1911, by which he devised the said land in Warren county to three nephews, defendants herein;

and that on October 21, 1911, the defendant Bockhorst, public administrator of said Warren county, was directed by the probate court of said county to take charge of the estate of said Henry Sattmann, situated in this State.

The petition then avers that the said Eliza Sattman, daughter of Sophia Sattmann, and mentioned as a beneficiary under the fifth clause of the latter's will, died intestate in Montgomery county, Missouri, on August 31, 1901; "that upon her death no administrator or other legal representative was appointed by any court to take charge of any estate which she might have had," until October 10, 1912, when plaintiff Nebel, public administrator of Montgomery county, was ordered by the probate court of such county to take charge of her estate. The petition further avers that the said Sophia Sattmann, at the time of the making of her will, and at the time of her death, was possessed of no personal property beyond what was required to pay the cost of administration upon her estate; that "the said legacy of \$1000 to her daughter Eliza Sattmann, on account of deficient mental condition of the said Eliza, was by the said testatrix during the lifetime of the said Eliza directed to remain in the charge of the said Henry Sattmann in the manner as stated aforesaid, and has never been paid by the said Henry Sattmann to any person lawfully entitled to receive the same." And it is averred that the said Sophia Sattmann intended to charge and did charge the said real estate owned by her at the time of her death with the payment of such legacy.

The petition concludes with the following prayer:

"The premises considered, plaintiff prays for the judgment of this court decreeing the aforescribed real estate to be charged with the payment of the said legacy of \$1000, bequeathed to the said Eliza Sattmann under the said last will and testament of the said Sophia Sattmann, deceased, as aforesaid; that the said

real estate be ordered sold, and that defendant Bockhorst, as the administrator in charge of the estate of said Henry Sattmann, deceased, make such sale; and after paying the costs of this proceeding and the said legacy, that he distribute the balance under the order of the probate court of Warren county, Missouri, and for all other proper relief."

To the petition the defendants filed demurrers, which were sustained by the court; and plaintiff declining to plead further, final judgment was entered for the defendants on the demurrers, and the plaintiff appealed.

The respondents raise the question of the jurisdiction of the circuit court over the subject-matter of the action, asserting that the same is within the exclusive jurisdiction of the probate court. And though it does not appear that the jurisdiction of the circuit court was distinctly challenged below, the question of that court's jurisdiction is one which may be raised at any stage of the proceeding, or may be considered by this court *sua sponte*.

The theory upon which plaintiff's petition proceeds is that by the fifth clause of her will Sophia Sattmann bequeathed to her daughter, Eliza Sattmann, the sum of \$1000, intending to make the same a charge upon the land devised to the son, C. Henry Sattmann. And it is sought now to have the land charged with the payment of such legacy, and to have the circuit court order the defendant administrator to sell such land, and out of the proceeds of the sale thereof pay such legacy and the cost of this proceeding, distributing the remainder thereof under the order of the probate court.

Our administration law (section 160, Revised Statutes 1909) provides that "if any person die and his personal estate shall be insufficient to pay his *debts and legacies*, his executor or administrator shall present a petition to the proper court, stating the facts and pray-

ing for the sale of the real estate, or so much thereof as will pay the debts and legacies of such deceased person." Succeeding sections of this article definitely prescribe the procedure for obtaining such an order of sale. And section 154 provides that if the executor or administrator fail to make an application for such sale, any creditor or other person interested in the estate may make the application, giving twenty days notice to the executor or administrator.

It has been repeatedly held that the probate court has exclusive jurisdiction to order the sale of lands of a decedent for the payment of his debts; that the aforesaid provisions of the administration law furnish a full and ample remedy for any deficiency in personal assets to pay such debts, where there is real estate in the hands of heirs or devisees within the jurisdiction of the probate court, and that resort must be had to the methods there pointed out to subject the real estate to sale for such purpose (*Tittering v. Hooker*, 58 Mo. 593; *French v. Stratton*, 79 Mo. l. c. 562; *Priest v. Spier*, 96 Mo. 111; *Scott v. Royston*, 223 Mo. 568, 123 S. W. 454) subject of course, to the right of appeal to the circuit court.

What is said as to the sale of lands for the payment of debts applies with equal force to the sale thereof for the payment of legacies (section 150, *supra*). And as the petition before us proceeds entirely upon the theory that there is here a monetary legacy remaining unpaid, and seeks to have the land ordered sold for the payment thereof, we think it quite clear that the relief sought could be afforded, if at all, only in the probate court, and that the circuit court is without jurisdiction in the premises.

While a suit in equity may sometimes be maintained in respect to matters which would ordinarily appear to be within the jurisdiction of the probate court, this is true only in those rare instances where the provisions of the administration law fail to furnish a com-

plete and adequate remedy in the premises, and where relief may be afforded only in a court of purely equitable cognizance. The following cases will illustrate: *May v. Pearson*, 121 Mo. App. 120, 97 S. W. 612; *Lemp Brewing Co. v. Steckman*, 168 S. W. 226; *Scott v. Royston*, *supra*. See, also, *Stanton v. Johnson's Estate*, 177 Mo. App. 1. c. 57, 163 S. W. 296.

Where, as here, the administration law has definitely provided a method of proceeding in the probate court for the attainment of the very object sought to be attained by a suit in equity in the circuit court, it seems clear that the latter court is without jurisdiction. Were the object of the suit not to enforce the payment of a legacy by the sale of the devised lands, but to impress a trust upon such lands for the support and maintenance of Eliza Sattmann during her lifetime, to the extent of the provision sought to be made for her by the testatrix, an altogether different question would be presented, and one as to which we need now express no opinion. But as the suit proceeds, we are of the opinion that the circuit court had no jurisdiction to entertain it.

It results that the judgment below should be affirmed, and it is so ordered. *Reynolds, P. J.*, and *Nor-toni, J.*, concur.

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D. M. JENNINGS et al., Appellants, v. J. S.  
OVERHOLT, Respondent.

St. Louis Court of Appeals, January 5, 1915.

1. **REAL ESTATE BROKERS: Employment: Sufficiency of Evidence.** In an action by a real estate broker for a commission for having procured an exchange of land, evidence held to show that defendant engaged plaintiff to find some one with whom he might make a trade or deal to dispose of his land.
2. ———: **Right to Commission: Special Contract.** Under a special contract requiring a real estate broker to dispose of



property upon certain terms, the owner may, in good faith, insist upon the exact price or the fulfillment of other terms of the contract, and refuse to sell to the broker's customer on modified terms, and if the broker, after full opportunity, fails to perform, the owner, as a new deal, may sell the property to the broker's customer on more favorable terms, without incurring liability for a commission; but if the owner deals with the broker's customer at a lower price or upon other terms, while the agency continues and the broker is working with the customer on the contract terms, the owner will be liable for a commission.

3. ———: ———: **Exchange of Land.** A real estate broker, authorized generally to effect an exchange of land, but not to fix the terms, who put defendant in communication with a landowner with whom defendant made an exchange, was entitled to a commission, notwithstanding the trade effected differed from the one suggested by the broker to his customer.
4. **EVIDENCE: Original Memoranda: Res Gestae.** A minute or memorandum in writing, made in the usual course of business, at the time when the fact recorded took place, is admissible in evidence, if authenticated by the oath of the party making it, when the surrounding circumstances make it probable that the fact recorded occurred; and hence, in an action by a real estate broker for a commission for having procured an exchange of land, his entry in a small book carried in his pocket, made in defendant's presence, when he suggested that defendant see the party with whom the exchange was finally made, and in the usual course of business, was admissible as part of the *res gestae*.

Appeal from Audrain Circuit Court.—*Hon. James D. Barnett*, Judge.

REVERSED AND REMANDED.

*Arthur Bruton and E. S. Gantt* for appellants.

- (1) The court erred in excluding plaintiffs' exhibit number 7. *Borgess Inc. Co. v. Veete*, 142 Mo. 560; *Anchor Milling Co. v. Walsh*, 108 Mo. 277; *Robinson v. Smith*, 111 Mo. 205; *Weels v. Hobson*, 91 Mo. App. 379; *Gulurulator v. Rettalacro*, 86 Mo. App. 184.
- (2) The court erred in modifying plaintiffs' instruction number 1 and refusing plaintiffs' instruction num-

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ber 2. Grether v. McCormick, 79 Mo. App. 329; Wetzell & Griffith v. Wagoner, 41 Mo. App. 509; Hovey & Brown v. Aaron, 133 Mo. App. 573; McCormick v. Obanion, 168 Mo. App. 606; Lane v. Cunningham, 171 Mo. App. 17. (3) The court erred in giving defendant's instructions numbers 1, 2 and 4. (4) The verdict is against the evidence and the weight of the evidence.

*E. C. Anderson* for respondent.

(1) There was no error committed on the part of the trial court in excluding plaintiffs' exhibit number 7. 17 Cyc. 380; Daum v. Neumeister, 2 Mo. App. 597; Gregory v. Jones, 101 Mo. App. 270. (2) The trial court committed no error in modifying plaintiffs' instruction number 1, and refusing plaintiffs' instruction number 2. 28 Mo. App. 61; 162 Mo. App. 284; 164 Mo. App. 454; 168 Mo. App. 606. (3) The trial court committed no error in giving defendant's instructions numbers 1, 2 and 4. Ramsey v. West, 31 Mo. App. 676; Real Estate Co. v. Real Estate Co., 144 Mo. App. 620; Crain v. Miles, 154 Mo. App. 338; Duncan v. Hills, 155 Mo. App. 702; 19 Cyc. 257. (4) The verdict is supported by the evidence and the weight of the evidence. State v. Espenschied, 212 Mo. 215; State v. Fraught, 140 Mo. App. 369.

ALLEN, J.—This is an action by a firm of real estate brokers to recover a commission as for having procured an exchange of lands of the defendant for other lands. The trial before the court and a jury resulted in a verdict and judgment for defendant, and the case is here upon plaintiffs' appeal.

Plaintiffs conducted a real estate business in Centralia, Missouri, and on April 18, 1911, defendant, then residing in Texas, where he owned 320 acres of land, wrote plaintiffs asking for a list of farm lands for

sale near Centralia, and inquiring whether plaintiffs had for sale a farm for which his land in Texas might be taken in part payment. To this communication plaintiffs promptly replied, and further correspondence passed between the parties during the early part of 1911. And in July, 1911, defendant made a trip to Missouri, at which time he called upon plaintiffs in regard to disposing of his land. During this period, however, nothing was found to suit defendant as an exchange for his property.

In January, 1912, defendant rented a farm about four miles north of Centralia, the lease for which was drawn in plaintiffs' office, and early in March of this year he moved from Texas to this farm. Upon arriving in Centralia he procured plaintiffs' assistance in making out a claim for alleged freight overcharges; and plaintiffs' evidence is, that at this time the defendant said to them: "As I have moved to your country, I want you fellows to get busy and get rid of my 320 acres in Texas," urging the plaintiffs to "go after it hard," and saying that he wanted "a deal;" and that plaintiffs assured him that they would do the best that they could in the premises. And the testimony for plaintiffs is, that they listed defendant's land in their office, and that defendant agreed to pay the usual commission for selling or exchanging such land.

On March 29, 1912, one of the plaintiffs, L. C. Jennings, met defendant in Centralia and suggested to him that a deal might be made with one Robert Angell, living a few miles north of the farm which defendant had rented, and who was contemplating moving to Texas. It appears that Angell owned two tracts of land in that vicinity, one of fourteen acres and the other of eighty acres, and that the fourteen acre tract had been listed with plaintiffs for sale. Plaintiff, L. C. Jennings, testified that he mentioned both tracts to defendant when he suggested that the latter see Angell, saying, however, that he did not know whether

Angell would part with the eighty acre tract. This plaintiff testified that defendant told him to "go ahead and push the deal," and that he thereupon, in defendant's presence, made an entry of the matter in a small book which he carried in his pocket, and that on the same day he wrote Angell in regard thereto. This letter, which merely refers to an exchange of Angell's "place" for land near Plainview, Texas, was introduced in evidence.

It appears, both from the testimony of plaintiff, L. C. Jennings, and from that of Angell's son, that upon receipt of the last-mentioned letter Angell had his son call this plaintiff by telephone and ask him to bring the defendant to see Angell's property. And the testimony of this plaintiff is, that he tried to reach the defendant by telephone during the next two days, without success, and then called Angell by telephone saying that he had not been able to reach the defendant but that he would go by defendant's house and try to get him, whereupon Angell said that the defendant was then at his house; that Jennings then said that he would come to Angell's house, but was told that this was unnecessary. It appears that the defendant and Angell promptly entered into a tentative agreement for the exchange of defendant's land in Texas for the eighty acre tract belonging to Angell; that the latter at once left for Texas to inspect defendant's property, and that upon his return the trade was consummated.

Angell testified that he first heard of defendant through the plaintiffs; and that during his negotiations with defendant the latter "put up a plea" that he might have to pay plaintiffs a commission. And his further testimony, as well as that of another witness and that of plaintiff, L. C. Jennings, tended very strongly to show that defendant expected to be charged a commission by plaintiffs, and understood that he was liable therefor, but that in the end he objected to the amount of the same.

There was evidence that the usual commission for the sale or exchange of such Texas lands was \$1 per acre. After the consummation of the trade plaintiffs demanded a commission of \$320, which defendant declined to pay, and this suit was instituted to recover the same.

Defendant testified that he "never considered" that he listed his land with plaintiffs, and that he did not agree to pay them a commission. He admitted his prior dealings with plaintiffs, and that on March 29 plaintiff, L. C. Jennings, suggested a trade with Angell, but said that Jennings only mentioned Angell's fourteen acre tract, and that plaintiffs had nothing to do with the deal made for an exchange of defendant's land for the eighty acre tract. Some testimony was adduced to the effect that defendant had previously heard that Angell was intending to move to Texas, and might want to trade for Texas land, but if this be true it is certain that defendant did not act upon such information at all prior to March 29, 1912, when plaintiffs suggested a trade with Angell, and that almost immediately thereafter defendant saw Angell and consummated the exchange.

The theory of the defense was, that defendant was not liable to plaintiffs in the premises, if the latter, in suggesting a trade with Angell, mentioned to defendant only the fourteen acre tract and if their efforts in respect to a trade with Angell were directed only to an exchange of defendant's land for this fourteen acre tract. This theory the court adopted and pursued in submitting the case to the jury. One instruction requested by plaintiffs was refused, as requested, but was given after being modified so as to tell the jury that plaintiffs could not recover unless it was found "that plaintiffs' effort to bring about an exchange of land between defendant and Angell related only to the fourteen acre tract and not to the eighty acre tract." And an instruction requested by

plaintiffs was refused which allowed a recovery, upon a finding of certain facts, though defendant took in exchange for his land other land belonging to Angell than that mentioned to him by plaintiffs. And the two instructions given for defendant proceeded upon the above-mentioned theory adopted by the court.

It is unnecessary to set forth these instructions in detail, for the reason that it is quite clear that the court's rulings with respect to the giving and refusing of instructions were based throughout upon an erroneous impression of the law applicable to the situation in hand. And it is clear that the argument here advanced by learned counsel for respondent in support of the court's rulings in the premises is unsound.

The evidence is abundant that defendant engaged plaintiffs to find someone in the vicinity of Centralia with whom he might make some trade or deal whereby to dispose of his Texas land. And the evidence is almost, if not, conclusive, that plaintiffs' efforts in the premises were the procuring cause of the trade actually consummated by the defendant.

In *Dillard v. Field*, 168 Mo. App. 206, 153 S. W. 532, it is quite well said by TRIMBLE, J.: "In order to solve the puzzling and sometimes difficult question whether an agent is entitled to his commission, two questions should be steadily kept in mind: '(1) What was the agent authorized or employed to do? (2) Has he completed his undertaking?' " In the case before us it is quite clear that plaintiffs were not employed under a special contract requiring them to dispose of defendant's property upon certain prescribed terms, nor in fact to consummate any deal. Where a special contract exists, it is elementary that the broker must show that he has fully complied with the terms and conditions thereof before he is entitled to recover, for otherwise he has not completed his undertaking and has earned no commission. In such a case the owner may, in good faith, insist upon the exact price, or the

fulfillment of other terms of the contract, and refuse to make a sale to the broker's customer on any modified terms; and if the broker fails to perform, after being allowed full opportunity so to do, the owner may in fact thereafter, as a new deal, sell the property to the broker's customer on more favorable terms, without incurring liability to the broker. [Blackwell v. Adams, 28 Mo. App. 61; LaForce v. Washington University, 106 Mo. App. 517, 81 S. W. 209; Tooker v. Duckworth, 107 Mo. App. 231, 80 S. W. 963; Stevens v. Bacher, 162 Mo. App. 284, 141 S. W. 1143; Hughes v. Dodd, 164 Mo. App. 454, 146 S. W. 446; McCormick v. Obanion, 168 Mo. App. 1. c. 615, 153 S. W. 267.] But even in such cases if the owner chooses to deal with the broker's customer at a lower price or upon other terms, while the broker's agency remains unrevoked, and he is still working with his customer at the price and upon the terms named to him, the owner will be liable to the broker for commissions upon a sale so consummated by him with the broker's customer. [See Wetzell & Grif-fith v. Wagoner, 41 Mo. App. 509; Larow v. Bozarth, 68 Mo. App. 407; Grether v. McCormack, 79 Mo. App. 325; Nichols v. Whitacre, 112 Mo. App. 692, 87 S. W. 594; Hovey & Brown v. Aaron, 133 Mo. App. 573, 113 S. W. 718; Lane v. Cunningham, 171 Mo. App. 117, 153 S. W. 525.]

In the instant case the terms of plaintiffs employment were of the most general character. The evidence is that defendant, both by correspondence and orally, solicited plaintiffs' services in the premises; but there is no pretense that plaintiffs were limited by any special contract requiring them to effectuate a disposal of defendant's property upon any stipulated terms. Indeed the evidence adduced in behalf of both plaintiffs and defendant shows clearly that what defendant desired plaintiffs to do, and what they undertook to do, was to find someone in the vicinity of Centralia with whom defendant might be able to make

some sort of a trade for his Texas land. Plaintiffs' undertaking was merely to put defendant in touch with someone with whom he might consummate such a trade. Plaintiffs were not authorized to consummate any deal themselves, but were to direct their efforts to finding someone who would consider exchanging land in that vicinity for defendant's property, leaving it to defendant to make a deal satisfactory to himself if he could. The evidence is that defendant contemplated that it might be necessary for him to assume an indebtedness, in making an exchange, or that there might be a cash difference, one way or the other, between the properties to be exchanged; and much, of course, would depend upon the location, character and value of the Missouri land, and the price at which it was held. With these matters plaintiffs had naught to do; but it was for defendant to make his own bargain, in case plaintiffs found a prospective trader.

Defendant, by letter, had originally stated to plaintiffs that he held his land at \$23 per acre. In trading with Angell he put in the 320 acres at \$25 per acre (a total of \$8000), and took Angell's eighty acres at a valuation of \$100 per acre. Under the circumstances of plaintiffs' employment, it was wholly immaterial whether defendant thus traded for the eighty acres, or took Angell's fourteen acres and the cash difference, or sold his land to Angell for cash, or made some other trade with Angell. In any event, if plaintiffs' efforts resulted in finding a customer with whom defendant could deal and were the procuring cause of the trade ultimately consummated, plaintiffs had earned their commission. [See *Perry v. Edelen*, 181 Mo. App. 498, 164 S. W. 645; *Lane v. Cunningham*, *supra*; *Grether v. McCormick*, 79 Mo. App. 325.]

It follows that the court's rulings as to the instructions were highly prejudicial to plaintiffs, and necessitate a reversal of the judgment.



A further assignment of error pertains to the action of the court in excluding the entry which L. C. Jennings testified that he made in a small book carried in his pocket when he suggested that defendant see Angell. It appears that such entry was made during this conversation with defendant upon the street, in defendant's presence, and in the usual course of business; that it was the custom of this plaintiff to thus make original entries of this character in this book, which he carried for this purpose. For the guidance of the lower court upon another trial, it may be well to say that we think that the entry was admissible as being a part of the *res gestae*. It is well established that a minute or memorandum in writing, made in the usual course of business, at the time when the fact recorded took place, by one since deceased, is admissible in evidence, when the surrounding circumstances render it probable that the fact occurred. [See Jones on Evidence (2 Ed.), sec. 119.] And in this country, at least, this doctrine has been extended to cases where the person who made the entry is still living, if the same is authenticated by his oath. [Jones on Evidence (2 Ed.), sec. 320.] The principle involved was very fully considered by this court in *Milne v. Railroad*, 155 Mo. App. 465, 135 S. W. 85, where, in an opinion by NORTON, J., many authorities are cited and discussed.

The judgment is reversed and the cause remanded, to be proceeded with in accordance with the views expressed above. *Reynolds, P. J., and Norton, J., concur.*

H. C. MARTH, Appellant, v. ED. A. WISKERCHEN,  
Respondent.

St. Louis Court of Appeals, January 5, 1915.

1. **JUSTICES' COURTS: Pleading.** No formality in pleading is required in suits instituted in justices' courts, and much liberality is to be indulged respecting the right of recovery under the pleadings.
2. ———: ———: **Suit on Written Instrument.** Where a suit instituted in a justice's court is based upon a written instrument, such instrument must, under Sec. 7412, R. S. 1909, be filed.
3. **CONTRACTS: Written Instruments: Effect of Alteration.** The statement of a cause of action, in a suit filed in a justice's court, alleged that defendant purchased of plaintiff a certain engine described and for a sum mentioned in a certain "contract," which was set out; that plaintiff caused the engine to be delivered to defendant at a certain place, and that defendant, after inspecting the engine, received and accepted it, but refused to pay plaintiff therefor, although plaintiff had performed his part of said contract of sale. The so-called "contract" was a mere memorandum, signed by defendant, evidencing the contract of sale which the parties had orally entered into, and was not filed with the statement, as required by Sec. 7412, R. S. 1909, when a suit is based upon a written instrument. *Held*, that the action was not based on the memorandum, and that the memorandum was pleaded merely as matter of inducement, and hence a defense that the memorandum had been altered was not tenable, in the absence of a showing that the alteration was made with fraudulent intent, since the alteration of a written instrument will not prevent a recovery for the original indebtedness evidenced by it or growing out of it, where the alteration was made without fraudulent intent.
4. **SALES: Rescission: Necessity of Prompt Action.** A buyer who desires to rescind a contract of sale on the ground that the thing sold does not comply with the terms thereof must, immediately upon discovering such fact, disaffirm, notify the seller of such disaffirmance, and tender back the thing sold; but "immediately" does not mean *instantly*, but means a reasonable time, under the circumstances.
5. **PRINCIPAL AND AGENT: Authority of Agent: Sufficiency of Evidence.** In an action for the purchase price of a chattel,

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defended on the theory that defendant had rescinded the sale because of a breach of warranty and had delivered the chattel to plaintiff's agent and directed him to notify plaintiff of the rescission, evidence *held* insufficient to prove that such person was plaintiff's agent.

6. **APPELLATE PRACTICE: Binding Effect of Theory at Trial.** In an action for the purchase price of a chattel, where the case was tried in the trial court on the theory that it belonged to plaintiff, defendant would not be heard to contend, on appeal, that it belonged to another.
7. **SALES: Rescission: Necessity of Prompt Action: Sufficiency of Evidence.** In an action for the purchase price of a chattel, defendant set up, by way of defense, that he had rescinded the sale because of a breach of warranty and had delivered the chattel to plaintiff's agent and directed him to notify plaintiff of the rescission. The evidence was insufficient to establish that such person was plaintiff's agent, but did show that plaintiff himself could have been reached by defendant with notice of the rescission during the day on which the alleged rescission was made and the day following. Plaintiff did not receive notice of the alleged rescission for about two months. *Held*, that the defense was untenable, for the reason that defendant did not promptly notify plaintiff of the rescission or tender back the chattel.
8. **JUSTICES' COURTS: Sales: Counterclaims.** In an action instituted in a justice's court for the purchase price of a chattel, defendant cannot recover for breach of warranty unless he files a counterclaim therefor prior to the trial before the justice.

Appeal from Lewis Circuit Court.—*Hon. Chas. D. Stewart*, Judge.

REVERSED AND REMANDED (*with directions*).

*R. J. McNally, Hilbert & Henderson and A. F. Haney* for appellant.

(1) The trial court erred in sustaining defendant's objection to the question put to plaintiff, on direct examination, as to whether he was acquainted with the price of new engines, such as this engine, at Ewing, Missouri, in 1910. This being sold as a secondhand

engine, the jury had a right to compare the price at which it was sold to defendant with the price of a new engine of the same kind, in passing upon the understood character and standard of perfection of this engine and the question whether it reasonably complied with the warranty. (2) The court erred in giving instruction number 2 on the part of defendant. This instruction authorizes the jury to find that defendant returned the engine "to the plaintiff or his authorized agent," and directs the jury to find a verdict on such finding. This instruction is highly improper and prejudicial, for the reason that there is no evidence that plaintiff had given any authority to anyone, either directly or indirectly, to represent him as his agent in the matter of receiving back the engine from defendant. The giving of an instruction when there is no evidence upon which to base it is reversible error. *Evans v. Graden*, 125 Mo. 72; *Groneweg v. Estes*, 144 Mo. App. 418; *Franz v. Hilterbrand*, 45 Mo. 121; *Bowles v. Lewis*, 58 Mo. App. 649; *Nelson Mfg. Co. v. Shreve*, 94 Mo. App. 518. (3) Instruction number 4 given on the part of defendant is erroneous, because there is no evidence on which to base it. See authorities cited under preceding point. Said instruction is unsupported by the evidence because (first) there is no evidence that plaintiff was absent so that defendant could not deliver the engine to him when he returned it to Ewing; (second) there is no evidence that defendant caused notice of such return to be given to plaintiff as soon as practicable. If the engine did not comply with the warranty embodied in the written contract of sale—that is, if it was not in running order and in good shape when delivered to defendant—then it was the duty of defendant, upon discovering any failure in said warranty, if he desired to take advantage of it for the purpose of rescinding the contract of sale, to promptly return said engine to plaintiff and promptly notify him of his intention to rescind the con-

tract on account of the breach of said warranty. The failure to return the engine to and to notify plaintiff until after a delay of about two months after the alleged discovery of the defect is, as a matter of law, an unreasonable delay, the evidence showing no valid excuse therefor; and the defendant will not be permitted to set up such attempted return and rescission as a defense to the action for the purchase price of the engine. *Steam Heating Co. v. Gas Fixture Co.*, 60 Mo. App. 148; *Johnson v. Whitman Agricultural Co.*, 30 Mo. App. 100; *Metropolitan Rubber Co. v. Monarch Rubber Co.*, 74 Mo. App. 266; *Tower v. Pauly*, 51 Mo. App. 75; *Emery v. Boehmer Shoe Co.*, 151 S. W. 174; *Sterling Silver Mfg. Co. v. Worrell*, 154 S. W. 866.

*Noel, Rouse and McKee* for respondent.

ALLEN, J.—This is an action to recover the purchase price of a traction engine alleged to have been sold and delivered by plaintiff to defendant. The cause originated before a justice of the peace, and found its way to the circuit court, where, upon a trial before the court and a jury, there was a verdict and judgment for defendant, and the plaintiff appealed.

On or about November 15, 1910, plaintiff, who was a general agent for the Advance Threshing Company, and who was then at Ewing, Missouri, sold the engine in question to defendant for the sum of \$150. It appears that a traveling salesman for another company learned that defendant wanted to purchase a second-hand engine, and that plaintiff had one, and brought the parties together. Plaintiff and defendant met the following day in the implement and harness store of one Henry Lesch, who was a local agent of the Advance Threshing Company, having been so appointed by plaintiff. After some discussion the parties agreed upon a sale of the engine to defendant for \$150, delivered at Ewing. Defendant thereupon signed a paper,

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which (as it appears in the statement filed with the justice of the peace) is as follows:

“Ewing, Mo., 11/15/1910.

“This is to certify that the undersigned agrees to purchase and pay to H. C. Marth the sum of \$150 in cash for the 12 H. P. Aultman & Taylor engine at Steffenville, delivered at Ewing, Mo., in running order and in good shape.

ED. A. WISKERCHEN.”

It appears that the engine was then in fact at or near Steffenville, but that plaintiff had previously arranged to have it taken to Knox City and did not know whether the parties who had agreed to move it had done so or not. It was brought to Ewing on the following Sunday, and delivered to the defendant. On Monday and Tuesday defendant and one Miles Walker and the latter's son, Russell Walker, both engineers, tested it, running it about the streets. It seems that the engine stood the test well, but that defendant insisted that plaintiff “guarantee” the boiler and crown sheet thereof for one year. Plaintiff thereupon executed a writing to this effect, and defendant gave plaintiff his check for \$150. Defendant and Russell Walker then (Tuesday afternoon) started to run the engine out to defendant's home, some four miles from Ewing. It seems that they had proceeded but a short distance when the engine gave trouble and they returned with it and put it on “the right of way” behind Lesch's store, and defendant told Lesch to notify plaintiff that he would not take it. And defendant thereupon stopped payment upon the check which he had given to plaintiff.

Plaintiff was in Ewing when defendant accepted the engine and left with it; and the only evidence in the record touching his departure therefrom is the testimony of Lesch, who says: “Next morning (Wednesday) I had to go out in the country and Mr. Marth (plaintiff) went to Illinois.” It further appears from

Lesch's testimony that he did not notify plaintiff of the return of the engine until some time in the following January, when he wrote plaintiff in regard to another matter. And plaintiff testified that he did not learn thereof until some time in January, 1911, when he returned to Ewing; that he then found that the crown sheet was cracked, and had it repaired, and on January 26, 1911, wrote defendant a letter, which was introduced in evidence, demanding a compliance with the terms of the sale. It appears that the local bank wrote plaintiff at the home office of the latter's company in regard to the dishonoring of defendant's check, and plaintiff testified that he did not know of it at the time, and did not learn that payment had been stopped on the check for "a good while afterwards."

There is much in the record touching the condition of the engine, and particularly the crown sheet, which need not be here detailed. Nearly all of it tends to show that the engine was in reasonably good order, and the crown sheet not cracked, when delivered to defendant. Miles Walker, defendant's engineer, testified that it was "in good running order" and "in good shape" when delivered. Russell Walker, the engineer who, with defendant, started with the engine from Ewing, testified that he let cold water into the hot boiler after stopping to clean out the injector, which in his opinion caused the crown sheet to crack; and that no leak had theretofore been observed therein.

I. One of the defenses below was that the memorandum of the sale signed by defendant had been altered after the execution thereof, by erasing the words "Knox City" and inserting "Steffenville" in lieu thereof. Defendant denied under oath that he executed the instrument set out in the statement filed; and he and two other witnesses testified that, as executed, the writing contained "Knox City" instead of "Steffenville." Plaintiff testified that the instrument

had not been in anywise altered; but that both Knox City and Steffenville were mentioned when the writing was prepared.

The court, in instructing the jury, pursued the theory that an alteration of the instrument, in the manner indicated above, by plaintiff or someone acting for him, without defendant's knowledge or consent, would render the same void and prevent a recovery by plaintiff. As to this it may be said that a strict rule has obtained in this State respecting the unauthorized alteration of an instrument by the holder, (now modified as to instruments within the Negotiable Instruments Law). It is unnecessary to here review the many cases on the subject, but see *Harvesting Co. v. Blair*, 146 Mo. App. l. c. 382, et seq., 124 S. W. 49, and cases cited and discussed; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300; *Koons v. St. Louis Car Co.*, 203 Mo. l. c. 256-259, 101 S. W. 49; *Mercantile Co. v. Tate*, 156 Mo. App. l. c. 242, 137 S. W. 619. It is certain that the alteration here claimed to have been made was not a material alteration, for it did not change the legal effect of the instrument in the slightest degree. Plaintiff testified, and it is wholly uncontradicted, that he owned but the one twelve horse-power Aultman & Taylor engine. And there is absolutely nothing to indicate that the alteration, if any, was made with fraudulent intent. But whether it must be held, under our law, that the instrument, if so altered, was rendered void, we need not decide. This is for the reason that we think that the action is not to be regarded as a suit on the instrument itself, and that plaintiff is here not to be denied a recovery on this ground.

In *Harvesting Company v. Blair*, 146 Mo. App. 374, 124 S. W. 49, this court in an opinion by NORTON, J., held that though a note had been altered, so as to prevent a recovery thereon, nevertheless, where the note had not been given in extinguishment of the debt which it evidenced, and the alteration was without



fraudulent intent, an action could be maintained upon the original indebtedness. This rule we regard as altogether sound, and it appears to find application to the facts of the case before us.

As the suit originated before a justice of the peace, no formality in pleading is required, and much liberality is to be indulged respecting the right of recovery under the pleadings. [See *Herrick v. Maness*, 142 Mo. App. 399, 127 S. W. 394; *Cornett v. Woolridge*, 152 Mo. App. 466, 133 S. W. 345; *Barr & Martin v. Johnson*, 170 Mo. App. 394, 155 S. W. 459.] The statement of the cause of action alleges that "defendant purchased of plaintiff a certain engine, described and for the sum mentioned, in the following contract:" (Setting out the paper signed by defendant); that plaintiff caused the engine to be delivered to defendant at Ewing, "in running order and in good shape, as a second-hand engine;" that defendant, after inspecting the engine, received and accepted it, but refused to pay plaintiff therefor, although plaintiff had performed "his part of the said contract of sale."

It nowhere appears that the instrument itself was filed, as the statute requires if the suit is based upon it (See Sec. 7412, R. S. 1909); and the writing was not a formal contract between the parties, but a mere memorandum signed by one of them, evidencing the contract of sale which they had orally entered into. Nor does it appear that it was intended to base the suit on the instrument, as such, though it is set out; but that it was sought to set up briefly the facts attending the transaction, as affording a basis for the recovery of the purchase price of the engine alleged to have been sold and delivered to defendant and received and accepted by him.

In this view, plaintiff is not here to be denied a recovery for such an alteration, if any, in the paper in question, since there is no evidence of any fraudulent intent whatsoever. And we therefore hold that

the evidence adduced on this score constituted no defense to the action. [Harvesting Co. v. Blair, *supra*.]

II. Defendant, if he desired to rescind the contract upon the ground that the engine did not comply with the terms thereof, was obliged to promptly disaffirm, notify plaintiff of such disaffirmance and tender back the property. Under such circumstances, a vendee is required to act with much promptness, if he intends to reject the thing sold. Indeed it is said that he must rescind immediately, upon discovering that the property is not as warranted or represented, though "immediately" does not mean *instantly*, but within a reasonable time for disaffirmance, under the circumstances. [See Long v. Vending Machine Co., 158 Mo. App. 662, 139 S. W. 819, and authorities cited.] The cases agree that the purchaser may not take time to deliberate, but must promptly notify the seller, and restore or tender back the subject-matter of the sale. [See Sterling Silver Manufacturing Company v. Worrell, 172 Mo. App. 90, 154 S. W. 866, and cases there cited.]

In the case before us, while it is true that the defendant brought the engine back to Ewing, he did not, according to the evidence adduced by both parties, notify the plaintiff of his attempted rejection thereof, or make any effort to do so, but merely caused the engine to be placed upon "the right of way" behind Lesch's store, telling Lesch to notify the plaintiff. The court evidently proceeded upon the theory that there was evidence from which the jury might find that Lesch was plaintiff's agent to accept a tender of the engine from the defendant; but the record is barren of anything to sustain this view. Plaintiff repeatedly testified that Lesch had no authority whatsoever to represent him; and neither does Lesch nor any other witness testify to the contrary. It is clear that no vestige of authority was shown on the part of Lesch to bind

plaintiff by receiving the engine from defendant when the latter attempted to rescind the contract.

The argument is advanced here that the engine was really sold by plaintiff's company, of which Lesch was an agent, and that hence delivery to Lesch sufficed. But not only was there positive testimony that the engine was plaintiff's individual property, but it was sold to defendant by plaintiff individually, and the case below was tried throughout upon the theory that the sale was a personal transaction between plaintiff and defendant. This argument therefore is without force.

The court further instructed the jury to the effect that defendant would be excused from returning or offering to return the engine within a reasonable time if the same was due to plaintiff's absence, and if such notice was given to plaintiff as soon as practicable. This likewise is wholly unsupported by the evidence. The evidence is that plaintiff was in Ewing on the day in question, and it is to be inferred that he was there when defendant returned the engine. From the testimony of Lesch, above mentioned, it seems that plaintiff did not leave Ewing until the following day. Nor is there anything to show that he could not have been thereafter reached within a reasonable time by the exercise of any diligence. But it does not appear that defendant made any effort to reach plaintiff, but merely told Lesch to notify him, and proceeded to stop payment on the check. By merely placing the engine on the "right of way," and asking Lesch to notify plaintiff, defendant thereby made Lesch his own agent for conveying such notice to plaintiff, which, according to the evidence, did not reach plaintiff until some time in the following January.

Under such circumstances, it was no defense that the engine did not comply with the terms of the contract of sale, if such were the case.

It is apparent that the evidence disclosed no valid defense to plaintiff's claim. The contract of sale is

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conceded, and nothing is shown in evidence to defeat plaintiff's right to recover the sale price. And if there was any liability on account of plaintiff's warranty in the premises, no counterclaim therefor was filed prior to the trial before the justice of the peace.

The judgment will therefore be reversed and the cause remanded with directions to the trial court to enter judgment for plaintiff for \$150, with six per cent interest thereon from the institution of the suit. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

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F. W. LLEWELLYN, Appellant, v. D. W. BUTLER  
et al., Respondents.

St. Louis Court of Appeals, January 5, 1915.

1. **APPELLATE PRACTICE: Conclusiveness of Findings: Equity Case.** Although findings in an equity case are not binding upon the appellate court, such court ought to give much deference thereto.
2. **CONVEYANCES: Mortgages and Deeds of Trust: Assumption of Mortgage: Liability of Grantee.** Where a deed conveying real property contains a recital that the grantee assumes and agrees to pay a mortgage debt on the property, and the deed is accepted by the grantee, he becomes personally liable to the mortgagee or his assigns for the payment of the debt; but this doctrine does not obtain where the grantee is not a real and genuine purchaser, whose name was inserted in the deed for convenience or as a mere channel for passing the title to another, nor does it obtain where the deed is executed and recorded without delivery to the grantee named therein and without his knowledge or consent, unless he subsequently ratifies such act.
3. **CONTRACTS: Contract for Benefit of Third Party: Rights of Third Party.** The rights of a party for whose benefit a contract is asserted to have been made are measured by the terms of the contract and are dependent upon its validity, and he cannot acquire a better standing to enforce the contract than that occupied by the party who made the contract for his benefit.

4. **CONVEYANCES: Mortgages and Deeds of Trust: Assumption of Mortgage: Liability of Grantee: Sufficiency of Evidence.** In an action by a holder of a note secured by deed of trust on real estate, against a person who was named as grantee in a deed conveying the property, which recited that the grantee assumed and agreed to pay the mortgage, defended on the theory that the deed was executed and placed on record without delivery to defendant and without his knowledge or consent, evidence *held* to support a finding in favor of defendant.
5. ———: ———: ———: ———: **Effect of Recording Deed.** The recording of a deed containing a recital that the grantee assumes and agrees to pay a mortgage on the property conveyed, is evidence of delivery and acceptance only so far as it relates to the passing of title, and is insufficient, standing alone, to warrant a finding that the person named as grantee assented to the obligation to pay the mortgage debt.
6. ———: ———: ———. A husband who desired to transfer to his wife real estate, which was encumbered by a mortgage, conveyed it to defendants by a deed which recited that defendants assumed and agreed to pay the mortgage, and recorded the deed, without having delivered it to defendants and without their knowledge or consent. Thereafter, defendants conveyed the property to the wife by a deed which obligated her to assume and pay the mortgage. *Held*, that since a grantee who assumes the payment of a mortgage debt is liable although his grantor is not liable, the insertion of the covenant in the deed to the wife, obligating her to assume the mortgage, had no tendency to show that defendants ratified the similar covenant in the deed to them.
7. ———: **Effect of Invalid Covenants.** A deed conveying real estate to a person who acted merely as a conduit through whom the title passed was not void merely because one of its covenants obligating the grantee to pay a mortgage on the property was invalid.

Appeal from Audrain Circuit Court.—*Hon. James D. Barnett*, Judge.

**AFFIRMED.**

*David H. Robertson and Fry & Rodgers* for appellant.

(1) When a grantee takes a deed containing a recital that the land is subject to a mortgage which

the grantee assumes or agrees to pay, he thereby becomes personally liable to the mortgagee for the mortgage debt. *Crane v. Stinde*, 156 Mo. 267; *Helm v. Vogel*, 69 Mo. 535; *Steele v. Johnson*, 96 Mo. App. 157; *Girardi v. Christe*, 148 Mo. App. 91; *Nelson v. Brown*, 140 Mo. 580. (2) Where a grantee takes a deed containing a recital that the grantee assumes or agrees to pay the mortgage, the law implies a promise to perform. *Helm v. Vogel*, 69 Mo. 535. The grantee by his deed acquired the equity in the land, which was a valuable consideration. *Railroad v. Crow*, 137 Mo. App. 465; *Steele v. Johnson*, 96 Mo. App. 159; *Kratz v. Stocke*, 42 Mo. 251. By the established principles of the law of contracts in Missouri, one valid promise is held a consideration for another. *Steele v. Johnson*, 96 Mo. App. 159; *Byrd v. Green*, 41 Mo. 389; *Eng. Encyc. of Law*, 727. By accepting the deed they obligated themselves as effectually as though they had signed it. *Crawford v. Edwards*, 33 Mich. 354. (3) The deed was accepted. By it the equity in the land was conveyed to the grantee. By reconveying this equity to another party the grantee accepted and approved the conveyance to him. *Beeson v. Green*, 103 Iowa, 406. (4) Butler having accepted the deed and afterwards conveyed it to a third party, he could not impair the legal effect of his own act, by oral evidence that he had never agreed to pay the mortgage. Parol evidence was not admissible to impeach the deed. *Muhlig v. Fiske*, 131 Mass. 110; *Beeson v. Green*, 103 Iowa, 406; *Wishart v. Gerhart*, 105 Mo. App. 112; *Henderson v. Henderson*, 13 Mo. 151; *Bobb v. Bobb*, 89 Mo. 411; *Hollocher v. Hollocher*, 62 Mo. 267. (5) The petition does not sustain a claim of fraud. Fraud in the execution of the deed is not pleaded nor does the evidence establish fraud. "There is no evidence tending to show that any fraud was practiced on the defendants to induce them to take the deed, and no excuse is presented for doing so without reading it."

Beeson v. Green, 103 Iowa, 406; Muhlig v. Fiske, 131 Mass. 110.

*E. S. Gantt* for respondent.

(1) Where a grantee receives the title only to convey it to another, he is not liable upon clause assuming payment of the mortgage on the land. Deyermund v. Chamberlain, 22 Hun (N. Y.), 110; Arnold v. Randle, 121 Wis. 462; 18 Colo. App. 313. (2) The recording of a deed is evidence of delivery, and acceptance only so far as relates to the passing of title and does not apply to a deed which imposes an obligation on the grantee to assume payment of the pre-existing incumbrance on the property. Swisher v. Palmer, 106 Ill. 432. (3) An assumption clause in the deed inserted by fraud cannot be enforced. Demarus v. Rodgers, 124 N. W. 457; 110 Minn. 49.

ALLEN, J.—This is an action to recover a balance of \$979 remaining unpaid upon a promissory note of \$1800, executed by defendants W. E. Bever and Dora D. Bever, his wife, to the order of plaintiff, dated May 8, 1911, and secured by deed of trust upon a house and lot in Mexico, Missouri. The note and the deed of trust were executed as a part and parcel of a transaction whereby defendant W. E. Bever traded to plaintiff the equity in a farm for the above-mentioned property. Thereafter Bever and his wife executed a warranty deed, of date June 20, 1911, conveying the house and lot to defendants D. W. Butler and Eliza E. Butler, his wife, which deed recited that the same was made and accepted subject to the deed of trust securing the above-mentioned note and that the said grantees assumed and agreed to pay said note. This deed was recorded on June 29, 1911. Thereafter a warranty deed, of date July 8, 1911, was executed by Butler and his wife, conveying the property to defendant Dora D. Bever, wife

of W. E. Bever, which deed was not recorded until June 3, 1912. On June 7, 1912, the deed of trust was foreclosed for nonpayment of the note, and the house and lot sold to satisfy the debt. At the sale plaintiff's attorney purchased the property for \$1000. This sum, after the payment of the expenses of the sale, was credited upon the debt and interest, leaving a balance of \$979 which is sought to be recovered in this action.

The suit proceeds not only against the said makers of the note, but against D. W. Butler and his wife, Eliza E. Butler, upon the theory that the two last-named defendants became personally liable to plaintiff under and by virtue of the above-mentioned assumption clause in the deed by which the property was conveyed to them. These defendants filed a separate answer, in which, among other things, it is averred that the deed to them was executed without their knowledge and consent, and that they had no knowledge of the existence thereof for a long time after its execution; that it was never delivered to them, but was placed of record without their knowledge or consent, and that they did not learn of the contents thereof until long afterwards; that they did not in fact purchase the property, nor pay anything therefor, but that said transfer was made to them merely in order to pass title through them from defendant W. E. Bever to the latter's wife, and that they were a mere conduit of title. The prayer of this separate answer is for a reformation of the deed, or that it be declared void.

The court sitting as a chancellor entered a decree, finding, among other things, that the deed to defendants D. W. Butler and Eliza E. Butler was made without their knowledge or consent, and that neither of them then knew of the contents thereof; that said defendants did not purchase the property, nor pay any consideration therefor, but that the conveyance to them was made solely for the purpose of transferring the title



from W. E. Bever to his wife Dora D. Bever; and that said deed was void. Judgment was thereupon rendered in favor of defendants W. D. Butler and Eliza E. Butler and against the other defendants; and the plaintiff appealed.

It appears that defendant Bever, who is a son-in-law of defendant Butler, is a man who can scarcely read and write, but slightly versed in business affairs, and of but little experience in transactions of this character. The testimony adduced in support of the separate answer of Butler and his wife tends to show that Bever desired to transfer the title to this property to his wife, Butler's daughter, and was told that it would be necessary to convey the same to a third person, who would reconvey to the wife, whereupon he suggested to the scrivener a conveyance to Butler for such purpose; that the scrivener prepared the deed to Butler and wife, which was executed and recorded as stated above; that the deed from Butler and wife back to Mrs. Bever was prepared and left with a notary public, who thereafter met Butler upon the street and told him that he had "some papers" for him and his wife to sign, and that later, and after the deed to them had been recorded, Butler and his wife went to the notary's office and executed the deed, of date July 8, 1911, conveying the property to Mrs. Bever, and left it with the notary. This deed was not recorded until June 3, 1912, shortly before the sale under the deed of trust. From the testimony of Bever and Butler it appears that the former left the recording of the deed to the notary public, and that Butler gave no heed to the matter at that time. Butler testified that he did not see the deed to him and wife until a short time before the foreclosure, and did not until then know of the assumption clause contained therein, and that shortly before the sale he got from the office of the notary public the deed executed by him and his wife, and put it on record. Much testimony was adduced tending to show that

neither Butler nor his wife had any knowledge of the contents of the deed to them until long after the transaction.

The evidence need not be referred to in further detail. Upon the whole it was such as to warrant the Chancellor's findings of fact above mentioned. Though such findings, in equity, are not binding upon us, we ought to give much deference thereto; and, regardless of this, an inspection of the record convinces us that they ought not to be disturbed.

It is well established that where a vendee of real estate accepts a conveyance thereof, which recites that he assumes and agrees to pay a mortgage debt thereupon, such vendee becomes personally liable to the mortgagee, or his assigns, for the payment of the debt, and the latter may maintain a personal action against him. [See *Nelson v. Brown*, 140 Mo. 580, 41 S. W. 960; *Regan v. Williams*, 185 Mo. 620, 84 S. W. 959; *Pratt v. Conway*, 148 Mo. 291, 49 S. W. 1028; *Bank of Senath v. Douglass*, 178 Mo. App. 664, 161 S. W. 601, and further cases cited.] But though this general doctrine prevails, it is said to hold good only where the purchaser "is a real and genuine purchaser, and not one whose name was inserted in the deed for convenience, or as a mere channel for passing the title to another." [See 27 Cyc. pp. 1353, 1354; *Deyermond v. Chamberlin*, 22 Hun, 110; *Arnold v. Randall*, 121 Wis. 462.]

But, in the case before us, assuming the truth of the evidence upon which the trial court based its findings, the defendant Butler and his wife not only acted as a mere conduit of title, but the title was put in them without their knowledge; and the deed running to them was not delivered to them, and they did not see it or have any knowledge that it contained the assumption clause in question prior to the recording thereof, nor until a question arose as to their liability. Under such circumstances we think that no personal

liability could attach to them. Surely one cannot be bound by such an assumption clause inserted in a deed which is executed and placed upon record without delivery to him, and entirely without his knowledge or consent—unless it be by his subsequent ratification thereof, which does not here appear. It is so held in *Deyermond v. Chamberlin*, *supra*, and in *Gill v. Robertson*, 18 Colo. App. 313. See, also, *Elliott v. Sackett*, 108 U. S. 132.

The principle underlying the liability of a grantee of mortgaged premises who agrees with his grantor to assume and pay the mortgage debt is that his promise made to the grantor may be enforced by the third person for whose benefit it is made, to wit, the holder of the mortgage. [See *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907.] And in such cases the rights of the party for whose benefit a promise is asserted to have been made must necessarily be measured by the terms of the contract of assumption, and dependent upon the validity of the latter. He cannot acquire a better standing to enforce the agreement than that occupied by the contracting parties themselves. [See *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198; *Bank of Senath v. Douglas*, *supra*, and authorities cited.] In the instant case, if it be true, as the court found, that Bever caused the deed in question to be executed and recorded without the knowledge or consent of the grantees, no one certainly will dispute the proposition that Bever, upon this showing alone, would have no standing in any court to enforce against Butler the pretended contract of assumption. And the right of the holder of the mortgage could rise no higher than that of Bever, the putative promisee. Under the court's findings, there was no valid contract whatsoever on the part of Butler and his wife; and liability may not be fastened upon them by implication of law arising from the presence of the assumption clause in the deed, when the facts attending the transaction make it appear to a

court of equity that they never in fact agreed to assume or pay the mortgage debt.

And the recording of the deed is evidence of delivery and acceptance only so far as it relates to the passing of the title, and is insufficient alone from which to find that the grantees assented to the obligation to pay the mortgage debt, which the instrument sought to impose upon them. [See *Swisher v. Palmer*, 106 Ill. 432.]

It is further argued that, since the deed from Butler and wife to Mrs. Bever contained a provision whereby the grantee assumed and agreed to pay the mortgage debt, Butler must be presumed to have known that the deed to him and wife contained a clause of the same character, for had it not, the assumption clause in the deed to Mrs. Bever would have been inoperative. But, regardless of other considerations, this argument is without force, for the reason that, in this State at least, it is held that where a grantee, who assumes a mortgage debt, derives his title from a grantor not originally liable therefor and who did not assume the same, he is nevertheless liable to the holder of the mortgage upon his contract of assumption; that the benefit of the grantee's promise to pay the debt inures to the benefit of the mortgagee without regard to the liability of the grantee's predecessor in title. [See *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907, overruling *Hicks v. Hamilton*, 144 Mo. 495, 46 S. W. 432.] It is clear that, from the mere presence of the assumption clause in the deed executed by Butler and his wife, it could not be inferred that they knew that the deed to them contained a like clause.

Other questions are raised and discussed in the briefs of counsel, but they are not controlling and need not be touched upon.

The court below held the deed to Butler and wife to be void, whereas it should have held only the contract of assumption therein to be void. This is not

complained of, however, and since a foreclosure has been had under the deed of trust it is doubtless inconsequential. The judgment will therefore be affirmed. It is so ordered. *Reynolds, P. J., and Nortoni, J., concur.*

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JULIUS JORKIEWICZ, Respondent, v. AMERICAN  
BRAKE COMPANY, Appellant.

St. Louis Court of Appeals, January 5, 1915.

1. **MASTER AND SERVANT: Delegation of Authority: Liability of Master.** It is the personal duty of the master to direct and control the work, so that, if one servant is given power and authority to direct and control other servants, in the performance of some branch of the master's work, the latter is liable for negligence on the part of such superior servant, in the exercise of the power and authority thus conferred upon him.
2. ———: **Injury to Servant: Dual Capacity Doctrine: Vice Principal or Fellow-Servant.** An employee, engaged as helper in making crankshafts, by placing a heated billet of metal in a die and causing it to be struck a number of blows by a steam hammer, was injured by a piece of the heated metal, which was sheared off by the die, flying into his eye. A coemployee had immediate supervision over all the men engaged in the work, and he directed the hammer driver and the helpers. The accident happened because the billet was not in a proper position to be struck by the hammer when the coemployee directed the striking of the hammer. In an action for the injuries thus sustained, evidence held to justify submission to the jury of the question whether the negligence of the coemployee in causing the billet to be struck when improperly placed was the act of a vice principal, for which the employer was responsible.
3. ———: **Dual Capacity Doctrine.** The dual capacity doctrine obtains in this State, and it is the character of the act, and not alone the rank of the servant, which determines the question of liability or nonliability of the master for the derelictions of such servant.
4. **DAMAGES: Personal Injuries: Excessiveness of Verdict.** A verdict for \$5000 for the loss of an eye was not excessive.

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Jorkiewicz v. Brake Co.

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**On Motion for Rehearing.**

5. **DAMAGES: Instructions: Waiver of Generality.** In an action for injuries resulting in the loss of an eye, an instruction which permitted the jury to assess damages in such sum as would compensate plaintiff for the loss of his eye, did not purport to authorize a recovery for loss of earnings, demanded in the petition, but not proved, and inasmuch as the instruction was correct in its general scope, defendant was in no position to complain that it was too broad, in the absence of a request by him that its scope be limited.

Appeal from St. Louis City Circuit Court.—*Hon.*  
*Daniel D. Fisher*, Judge.

**AFFIRMED.**

*A. & J. F. Lee* and *James A. Waechter* for appellant.

(1) Defendant's instruction of nonsuit should have been given, because (a) The evidence established, without conflict, Cripps and plaintiff were fellow-servants. (b) The dual capacity doctrine is established in Missouri. *Garland v. Railroad*, 85 Mo. App. 579; *Robinson v. Railroad*, 133 Mo. App. 101; *Moore v. Railroad*, 85 Mo. 588; *Card v. Eddy*, 129 Mo. 510; *Hawk v. Lumber Co.*, 166 Mo. 121; *Relyea v. Railroad*, 112 Mo. 86; *Livengood v. Lead & Zinc Co.*, 179 Mo. 229; *Thompson on Negligence*, p. 952; *Weekes v. Scharer*, 11 Fed. 330. (c) The power to give an order incidental to the work can be delegated by the master without responsibility to a servant for its negligent exercise. *Shaw v. Construction Co.*, 102 Mo. App. 666; *Thompson on Negligence*, p. 953; *Weekes v. Scharer*, 11 Fed. 330; *Milbench v. Jenks Mfg. Co.*, 21 R. I. 321; *Lepan v. Hall*, 128 Mich. 523; *Knutter v. N. Y. & N. J. Tel. Co.*, 67 N. J. Law 646. (2) Plaintiff's instruction number 1, is erroneous, because—(a) It assumes contravened facts. *Bryan v. Lamp Co.*, 176 Mo. App. 729; *Radke v. Basket & Box Co.*, 229 Mo. 24; *Crow v. Railroad*,

212 Mo. 610; *James v. Railroad*, 107 Mo. 405. (b) It makes defendant liable for the improper placing of the steel even though improperly placed by fellow-servants. (c) It was confusing and misleading. (d) It was not warranted by the evidence. *Lukaminski v. Foundries*, 162 Mo. App. 631; *Glaser v. Rothchild*, 221 Mo. 180. (e) Its errors were not cured by any other instruction in the case. (f) It instructed a recovery for loss of earnings where loss of time was proved but no proof of value of earnings lost. *Ingles v. Railroad*, 145 Mo. App. 246; *Grout v. Railway*, 151 Mo. App. 334; *Slaughter v. Railroad*, 116 Mo. 276; *Duke v. Railroad*, 99 Mo. 347. (3) Defendant's instruction number 3 should have been given because it was clearly established that Cripps and plaintiff were fellow-servants throughout. See cases cited under point I, *supra*. (4) The verdict is excessive, because no other proof of damage was given than the loss of an eye.

*Henry M. Walsh* for respondent.

(1) The question upon which the case seems to hinge as nearly as can be judged from the pleading of the defendant and the evidence offered by it, is whether or not Cripps was the vice principal and if so was the act of Cripps responsible for the injury to the plaintiff; first, by negligently placing or causing to be placed the iron or steel billet which was being made into a crank shaft; second, the order of Cripps to the hammer boy Reinhart to strike with the steam hammer, the billet improperly placed. There seems to be no question as to what Cripps, the hammersmith, did; that is fully set forth in the record. The other witnesses, both for the defendant and the plaintiff, all agreed that Cripps had charge of the work. This being admitted, for it was not in any way denied, we have an almost unbroken line of decisions which then fix

the liability on the defendant, this appellant. Cox v. Granite Co., 39 Mo. App. 424; Carter v. Baldwin, 107 Mo. App. 173; Gormly v. Iron Works, 61 Mo. 492; Meltin v. Railroad, 109 Mo. 350; Dayharsh v. Railroad, 103 Mo. 570; Russ v. Railroad, 112 Mo. 45; Keown v. Railroad, 141 Mo. 86; Donahoe v. Kansas City, 136 Mo. 670; Stube v. Iron & Fdy. Co., 85 Mo. App. 640; Haworth v. Railroad, 94 Mo. App. 215; English v. Rand Shoe Co., 145 Mo. App. 439; Grimley v. Vulcan Iron Works Co., 61 Mo. 492; Hoke v. Railroad, 88 Mo. 360; Foster v. Railroad, 115 Mo. 165; Miller v. Railroad, 109 Mo. 350; Koerner v. St. Louis Car Co., 209 Mo. 159; Schmelzer v. Furniture Co., 134 Mo. 498; John Burkhart v. A. Leschen & Sons Rope Company, 217 Mo. 466; Hoke v. Railroad, 88 Mo. 360; Stephens v. Railroad, 86 Mo. 221; Smith v. Railroad, 92 Mo. 359; Tabler v. Railroad, 93 Mo. 79; Russ v. Railroad, 112 Mo. 45; La Salle v. Kostka, 190 Ill. 130; Sambos v. Railroad, 114 S. W. 569.

ALLEN, J.—This is an action for damages for personal injuries sustained by plaintiff while in the employ of the defendant corporation as its servant. There was a verdict and judgment for plaintiff, and the defendant appealed.

Plaintiff, at the time of his injury, was working as a member of a crew of five men, known as the "hammer crew," in defendant's factory. He was assisting in the making of crank-shafts, which was done by placing a heated billet of metal in a die and causing it to be struck a number of blows by a steam hammer, and was injured by a piece of such heated metal, which was sheared off by the die when the hammer descended, and which flew into his right eye, destroying the sight thereof and requiring its removal.

One Cripps, called the hammersmith, had immediate supervision over the other men engaged with him in doing the work in question. There were the



"heater," who heated the billets at the furnace, plaintiff and one Thomas, who were the hammersmith's helpers, and a youth named Reinhart, who operated the steam hammer.

Upon the occasion in question one of these billets of metal, which it seems was some twenty-six inches long, averaging perhaps four or five inches in diameter, had been heated nearly to white heat by the heater at the furnace. It was to be placed vertically in the die, and, when in proper position, was to be driven into the latter by the hammer. Plaintiff's evidence is that Cripps, who directed the operation, took hold of the billet at the furnace with a pair of tongs, and that plaintiff and Thomas assisted him in lifting it to the die by placing an iron bar beneath the tongs; that under the direction of Cripps it was placed in the die, but was not placed straight, or squarely in position, therein; that Cripps then handed plaintiff and Thomas the tongs, and that they, under Cripps' direction, were attempting, without success, to turn the billet, which was tight in the die, when Cripps told them to take the tongs off and directed young Reinhart to let the hammer descend.

Such is the testimony of plaintiff and other witnesses. And plaintiff testified that he made an effort to tell Cripps that the billet was not in proper position to be struck by the hammer, but did not have time to do so.

While it appears that the upper part of the die, which had what is termed a "toe," was larger than the lower part thereof, and that the metal was hastily drawn over toward this "toe" by a "fuller rod," and that the metal necessarily extended somewhat above the die before being struck by the hammer, plaintiff's evidence tended very strongly to show that the failure to properly place the billet in position caused the upper part of the metal thereof to lap over the die and be sheared off by the latter when the hammer descended.

It appears that in driving such a billet into the die sparks would invariably fly off, which were harmless, but that it was not customary for pieces of the metal to be sheared off and to fly about; and that upon this occasion not only was plaintiff injured by a piece of such flying metal, but that the hammersmith himself was slightly injured in a like manner.

It is strongly urged that the defendant's demurrer to the evidence should have been sustained, but we are not so persuaded. The argument in support of the demurrer appears to disregard the fact that our courts adhere to the doctrine, not universally recognized, that it is the personal duty of the master to direct and control the work, and that if one servant is given power and authority to direct and control other servants, in the performance of some branch of the master's work, the latter is liable for negligence on the part of such superior servant in the exercise of the power and authority thus conferred upon him. That this doctrine is firmly established in this State will appear by reference to a few of the many authorities which might be cited in this connection. [See *Moore v. Railroad*, 85 Mo. 588; *Schroeder v. Railroad*, 108 Mo. 322, 18 S. W. 1094; *Miller v. Railroad*, 109 Mo. 357, 19 S. W. 58; *Bane v. Irwin*, 172 Mo. 306, 72 S. W. 522; *Burkard v. Rope Co.*, 217 Mo. 1. c. 482, 117 S. W. 35; *English v. Rand Shoe Co.*, 145 Mo. App. 451, 122 S. W. 747.]

Undoubtedly the evidence adduced by plaintiff sufficed to justify the submission of his case to the jury upon the theory that plaintiff and Cripps were not mere fellow-servants, but that the negligent act of the latter in causing the billet to be struck when improperly placed in the die was the act of a vice-principal, for which the master is responsible. Touching this matter Cripps' own testimony is that his authority to direct and control extended to everything that went on "around the hammer;" that he directed the hammer-driver and told the helpers what to do, and exercised

general supervision over the "whole gang," with the exception of the firemen who was under the supervision of another. And the evidence is that the superintendent's orders were for the members of this crew to follow the directions of the hammersmith who supervised this branch of the work. And the operator of the hammer says that he operated the same only upon signals or orders from the hammersmith, in accordance with his instructions from the superintendent.

It is true that the dual capacity doctrine is firmly implanted in the law of this State. [See *McIntyre v. Tebbets*, 257 Mo. 117, 165 S. W. 757; *English v. Rand Shoe Co.*, supra; *Mertz v. Leschen & Sons Rope Co.*, 174 Mo. App. 94, 156 S. W. 807; and authorities referred to in these cases.] And it is also quite true that it is the character of the act, and not alone the rank of the servant, which determines the question of liability or nonliability in a case of this character. [See authorities last above cited.] But here plaintiff's case is bottomed upon a negligent act of the superior servant, committed in the performance of his duties as the *alter ego* of the master. According to plaintiff's evidence, strongly reinforced by that adduced by defendant, Cripps directed the work, and it was he who determined when the metal should be struck by the hammer; and although it was apparent to others (and it said to Cripps also) that the billet was improperly placed in the die, nevertheless he immediately ordered it to be struck, whereby plaintiff was injured. He alone had control over the situation, and his act in the premises is the act of the master. And though he was one of the workmen engaged in this work, and performed manual labor in prosecuting the same, as did plaintiff, the injury was occasioned by an act on his part done in the capacity of a vice-principal. In this respect the facts are unlike those presented in *McIntyre v. Tebbets*, supra, where it is held that the act which occasioned the injury was the act of a fellow-servant.

An instruction given for plaintiff is complained of in several particulars. It is needless, however, to prolong the opinion in order to discuss the questions thus raised. We have carefully examined the instruction and we think that appellant's criticisms of it are entirely without merit. While technically it might be improved in form, it is quite clear that it requires the jury to find the facts necessary to a recovery by plaintiff, in accordance with the theory of his case as discussed above, and that no reversible error inheres in it.

A further contention is that the verdict, which was for \$5000, is excessive; but in view of plaintiff's loss we would not be justified in disturbing the verdict on this ground.

The judgment should be affirmed, and it is so ordered. *Reynolds, P. J., and Nortoni, J., concur.*

#### ON MOTION FOR REHEARING.

ALLEN, J.—It is strenuously urged that we have entirely overlooked the point made by appellant that the instruction given for plaintiff, above referred to (plaintiff's only instruction), is erroneous in respect to the measure of damages. We have not in fact overlooked this attack upon that instruction, but we deemed it unnecessary to discuss the matter.

Plaintiff's said instruction tells the jury that if they find certain facts, then to find for plaintiff, "and assess his damages in such sums as you shall find will compensate him for the loss of his said eye." The petition averred, among other things pertaining to plaintiff's loss, that by reason of the loss of his eye plaintiff had been unable to work for more than four months. There was no proof, however, of loss of earnings. Appellant's contention is, that this instruction authorized a recovery for loss of earnings, with no proof to sustain the same; and that it is otherwise fatally defective in failing to limit the recovery to

the proper elements of compensation which the jury were lawfully authorized to take into consideration. Appellant relies upon a number of cases not necessary to be here cited, and particularly upon Davidson v. Transit Co., 211 Mo. l. c. 345, 109 S. W. 583. But it is quite apparent that the giving of the instruction in this form, relative to the damages recoverable, was not reversible error. That part of the instruction was good enough in its general scope. [Browning v. Railroad, 124 Mo. l. c. 71, et seq., 27 S. W. 644.] It did not purport to authorize a recovery for loss of earnings. And if appellant desired to have the jury instructed that no recovery could be had for loss of earnings, or to otherwise limit the recovery, it was its duty to ask a limiting instruction, which was not done.

The real point here involved has been recently passed upon by the Supreme Court in King v. St. Louis, 250 Mo. 501, 157 S. W. 498, where the doctrine of the Browning case, *supra*, is reaffirmed, the court saying, (l. c. 5140): "Mere indefiniteness in a general instruction, when appellant stands mute and asks none, is not reversible error." The same doctrine has been still more recently approved by the Supreme Court in State ex rel. United Railways Company v. Reynolds, 257 Mo. 19, where, on *certiorari* to quash the judgment of this court in Nelson v. United Railways Co., 176 Mo. App. 423, 158 S. W. 446, it was held that we did not err in applying the doctrine of the Browning case where an instruction was objectionable only on the ground that it was too general in form and appellant failed to ask an instruction limiting the effect thereof so that it might not be misunderstood by the jury.

The motion for rehearing is overruled.

COATSWORTH LUMBER COMPANY, Appellant, v.  
D. C. OWEN et al., Respondents.

St. Louis Court of Appeals, January 5, 1915.

1. **SPECIAL TAXBILLS: Improvement of Streets: Validity of Proceedings.** A resolution passed by the council of a city of the third class, declaring it necessary to pave a street with first-class vitrified paving bricks or blocks, and to curb the same with first-class concrete curbing, according to plans, diagrams and specifications on file with the city clerk, filed by the city engineer, complies with the requirements of Sections 9254 and 9255, R. S. 1909.
2. ———: ———: ———. An estimate of the cost of paving and curbing a street in a city of the third class, filed by the city engineer, which gives the estimated cost of paving the street, stating separately the estimated cost per square yard of the foundation, sand cushions, fillers, and brick surface, and estimates the cost of curbing at a specified sum per lineal foot, and estimates the total number of square yards of paving and lineal feet of curbing and the total cost, complies with the requirements of Sec. 9254, R. S. 1909.
3. ———: ———: ———: **Time for Completion of Work.** An ordinance for a street improvement and the contract for the work provided that the work should be completed on or before a designated date, "unless delayed by bad weather and the council grant an extension of time on that account." The work was substantially completed before the designated date, but there were defects in it, due to the fact that the temperature at times fell below freezing point while the work was being done. After the expiration of the time limit, an ordinance was passed extending the time of completion of the work on account of bad weather. As soon thereafter as the work could be safely done, the defects were remedied under the direction of the city engineer. *Held*, that the special taxbills issued for the cost of the work were not void on the ground that the work was not completed within the time limit.
4. ———: **Cancellation: Quieting Title.** Where a special taxbill for a street improvement is absolutely void for defects apparent on its face and on the face of the tax proceedings, equity will not cancel the bill as a cloud on the title to the land against which it is issued; but the rule is otherwise where the bill appears to be valid on its face and the invalidity asserted is one requiring extrinsic evidence to establish it.

5. ———: **Commencement of Lien.** The time of the commencement of the lien of a special taxbill is determined by the statute creating the right to issue the bill.
6. ———: **Irregularities: Amendment of Bill.** The irregularity in an original special taxbill for a street improvement because issued against three lots jointly may be corrected by the issuance of amended taxbills against each lot, but the lien arises at the date of the issuance of the original bill.
7. ———: ———: ———: **Proper Officer to Sign.** Amended special taxbills, issued in lieu of an original bill, which was irregular, are properly signed by the person who, as mayor, signed the original bill, notwithstanding his term of office had expired.
8. ———: **Performance of Work: Substantial Compliance.** A reasonable and substantial compliance, in good faith, with the ordinance and contract for a street improvement is all that the law requires.
9. ———: ———: ———: **Sufficiency of Evidence.** In an action to cancel a special taxbill for the cost of improving a street in a city of the third class, evidence held to justify a finding that the contractor had reasonably and substantially complied, in good faith, with the ordinance and contract provisions.
10. ———: ———: ———. Although a proceeding to enforce a special taxbill issued for the cost of street improvements is *in invitum*, and the law, jealously safeguarding the substantial rights of the citizen, does not permit his property to be burdened with a lien for such improvements unless the contractor has, in good faith, fairly and substantially complied with the terms and conditions of his undertaking, according to the true spirit and intent thereof, nevertheless it is not the policy of the courts to demand a highly technical, literal compliance with the contract stipulations, without regard to the obvious intent and purpose thereof, for such would tend to defeat the very objects of the law authorizing municipalities to provide and contract for the making of improvements of this character.
11. ———: **Action to Quiet Title: Counterclaims.** Where suit is brought to cancel a special taxbill, defendant may enforce the lien thereof by way of counterclaim, under Sec. 1807, R. S. 1909, as being a cause of action arising out of the transaction forming the foundation of plaintiff's claim or connected with the subject of the action.
12. **NEW TRIAL: Appellate Practice: Action on Special Taxbills: Sufficiency of Motion for New Trial.** A motion for a new trial on the ground that the court, in rendering judgment on

## Lumber Co. v. Owen.

special taxbills, erred in allowing interest thereon from the date of their issue, and that the verdict and finding were excessive, preserved to the party complaining the right to question the finding as to interest.

13. **APPELLATE PRACTICE: Municipal Ordinances: Pre-requisites to Review.** A municipal ordinance cannot be considered by the appellate court unless it is preserved in the record for review.
14. **SPECIAL TAXBILLS: Interest.** Where neither the ordinance authorizing a street improvement nor that levying the assessment and providing for the issuance of special taxbills for the cost of the improvement provided for interest, interest was not allowable on the taxbills, although, under Sec. 9254, R. S. 1909, the city could have provided that the bills bear interest at the rate of eight per cent per annum, to begin thirty days after issue.

Appeal from Audrain Circuit Court.—*Hon. James D. Barnett*, Judge.

**AFFIRMED** (*conditionally*).

*Fry & Rodgers* for appellant.

(1) This is a proceeding in *in invitum* and there should be no departure from legal requirements. *Rose v. Trestrail*, 62 Mo. App. 352; *West v. Porter*, 89 Mo. App. 153; *Schibel v. Merrill*, 185 Mo. 550; *Construction Co. v. Coal Co.*, 205 Mo. 81. (2) There was no estimate of the cost of the work as required by the statute. R. S. 1899, sec. 5858, paragraph 8; *City of Boonville v. Rogers*, 125 Mo. App. 142; *Wheeler v. Popular Bluff*, 149 Mo. 36; *City of Independence v. Briggs*, 58 Mo. App. 323; *City of Kirksville v. Coleman*, 103 Mo. App. 215; *City of De Sota v. Showman*, 100 Mo. App. 323; *Erie v. Brady*, 150 Pa. 462. (3) Time was the essence of the contract. The work was not completed within the contract time, on or before January 1, 1909. An ordinance to extend the time, passed in February, 1909, after the expira-



tion of the contract time, was of no effect, and the tax bills are void. Neill v. Gater, 152 Mo. 585; Hund v. Rockliff, 192 Mo. 312; Heman v. Gilliam, 171 Mo. 258; Schibel v. Merrill, 185 Mo. 550; Paving Co. v. Munn, 185 Mo. 569; Montague v. Kalmeyer & Co., 138 Mo. App. 288; Construction Co. v. Coal Co., 205 Mo. 49. (4) The original tax bill plaintiff asked to be cancelled was void, because it was a joint tax bill against the three lots. R. S. Mo. 1909, sec. 5252. On defendant's answer voluntarily withdrawing and canceling said tax bill, plaintiff was entitled to a decree. (5) The tax bills were not legally issued and were void. All special tax bills shall be issued by the city. R. S. Mo. 1909, sec. 9254. They shall be "signed by the mayor and attested by the city clerk with the seal of the city attached." R. S. 1909, sec. 9257. (6) Plaintiff was not personally liable for the special taxes. It was not a personal indebtedness nor a mutual indebtedness. The tax bills on which defendant recovered judgment were not in existence "at the commencement of the plaintiff's action." Hence not subject of counterclaim. R. S. Mo. 1909, sec. 1807. The tax bills can be enforced only by the statutory action to subject the specific property to the payment of the tax. This statutory remedy which is an action *in rem*, is the exclusive remedy. The court erred in entering judgment on defendant's counterclaim. City of Clinton v. Henry Co., 115 Mo. 557; Seibert v. Tiffany, 8 Mo. App. 33. (7) The court erred in allowing eight per cent interest, or any interest, prior to date of judgment. R. S. Mo. 1909, sec. 9254. As the council made no provision for interest and the tax bills were not issued for interest, the court erred in adjudging interest. And especially from date of tax bill when even the council could not have required interest until 30 days after April 12, 1911. R. S. 1909, sec. 9254, paragraph 10. (8) On the facts plaintiff is entitled to a decree. This being an action in equity, the appellate court will re-

view the entire evidence regardless of the opinion of the trial court. Where material was not used or the work done as required by the contract, the collection of the tax bills will not be enforced. *Schibel v. Merrill*, 185 Mo. 550; *Coulter v. Construction Co.*, 131 Mo. App. 235; *Cole v. Skrainka*, 37 Mo. App. 427, 105 Mo. 303; *Herman v. Gerardi*, 96 Mo. App. 231; *Traders Bank v. Payne*, 31 Mo. App. 512; *Heman v. Franklin*, 99 Mo. App. 346; *McGath v. St. Louis*, 215 Mo. 207.

*E. S. Gantt, Philip S. Gibson and David H. Robertson* for respondent Owen.

(1) The preliminary resolution was sufficient. By reference the plans and specifications were incorporated in the resolution. They were on file at the clerk's office. *Bridewell v. Cockrell*, 132 Mo. App. 203. (2) The estimate is sufficient. *Gratz v. Kirkwood*, 165 Mo. App. 209; *Boonville v. Stephens*, 238 Mo. 339, 355. (3) The work was completed in contract time. The work was actually all done before January 1, 1909, but weather conditions ruined portions of the curbing and the work thereafter done was merely repair. However, days lost by bad weather were by the ordinance for the work, number 330, to be added to the time. As the work of curbing could not be done until April, 1909, on account of freezing, the time was automatically extended. If the curbing had been stopped at the beginning of freezing weather the contractor would have had the right to postpone the completion until warm weather. However, he attempted to continue with the work and when the freezing weather ruined part of it he was entitled to wait until warm weather to conclude. *Pentice v. Schmidt*, 202 Mo. 703. The ordinance exhibit 8 is not an attempt to extend the time. The bad weather had already extended it. The ordinance simply recognized this fact and postponed acceptance and issuance of the tax bills until the contractor had rem-

edied the defects caused by bad weather. (4) The tax bills set out in the defendant's answer were legally issued. It was within the power of the person who as mayor issued the original tax bills, to amend the same to conform to the requirements of the statute, after he ceased to hold the office and no other person could sign them. *Kiley v. Cranor*, 51 Mo. 541; *Galbreath v. Newton*, 45 Mo. App. 312; *Riley v. Stewart*, 50 Mo. App. 494; *Morley v. Weakley*, 86 Mo. 450; *Stadler, Admx. v. Roth and Meyer*, 59 Mo. 400. (5) The tax bills upon which the respondent recovered judgment were a proper subject for a counterclaim in this action. Page and Jones "Taxation and Assessment," sec. 1445, page 2102; *Kendig v. Knight*, 14 N. W. 78; *Smith v. Des Moines*, 76 N. W. 836; *Henman v. McNamara*, 77 Mo. App. 1; *The City of Kansas City to the use of Coates v. Ridenour, et al.*, 84 Mo. 253; *Swope v. Weller*, 119 Mo. 556. (a) The cause set out in the counterclaim was in existence at the time of the commencement of the action. Cases cited under point 4. (b) The counterclaim in the case at bar comes under the first division of section 1807 of R. S. of Mo. 1909, "cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." A counterclaim coming within this clause need not exist at the commencement of the action. *California Creameries Co., Limited, v. Pacific Sheet Metal Works*, 164 Fed. 978; *Smith v. French*, 13 N. C. 1; 53 S. E. 435. (6) The court properly allowed interest at eight per cent on the tax bills. (7) The contractor cannot be held to a literal compliance with the terms of the contract; substantial compliance is all that is required. *Cole v. Skrainka*, 105 Mo. 309; *Sheehan v. Owen*, 82 Mo. 458; *Meyers v. Wood*, 173 Mo. App. 577; *Trimble v. Stewart*, 168 Mo. App. 276; *Steffen v. Fox*, 124 Mo. App. 635; *City of St. Louis v. Rueckling*, 232 Mo. 23.

ALLEN, J.—This is a suit in equity, prosecuted by plaintiff corporation, the owner of certain property abutting upon Jefferson street in the city of Mexico, Missouri, to cancel a special tax assessment thereon in favor of the defendant contractor for the paving and curbing of said street. The original tax bill, which the petition seeks to have cancelled, was for \$1137.48, and was issued on May 4, 1909, jointly against three lots belonging to the appellant, though the ordinance levying the special assessment levied it against the lots separately. The suit was instituted on August 20, 1910, and during its pendency, to-wit, on April 12, 1911, the original tax bill was cancelled and withdrawn by the city, and a separate tax bill was issued against each lot for \$379.16. And thereafter the defendant Owen, the contractor, filed an amended answer, alleging the cancellation of the original tax bill and the issuance of the three new bills, and therewith filed three separate counterclaims seeking to enforce the lien of the new tax bills.

It is unnecessary to further notice the pleadings. The suit was originally instituted against both Owen, the contractor, and the city, but the court dismissed it as to the city, on the ground that it had no interest in the litigation. The trial, before the court sitting as a chancellor, resulted in a finding for defendant Owen, both on plaintiff's bill and on each of said defendant's three counterclaims. Judgment followed accordingly, and the case is here upon plaintiff's appeal.

On July 15, 1908, the city council of the city of Mexico passed a resolution, which was thereafter duly published, declaring it necessary to pave the portion of Jefferson street in question with first-class vitrified paving brick or blocks, and to curb the same with first-class concrete curbing, reference being made to plans, diagrams and specifications on file with the city clerk, filed by the city engineer; the cost of such improvement to be paid by levying an assessment against the abut-

ting property. On the same day plans and specifications were filed by the city engineer with the city clerk, the former consisting of a plat or map, and the specifications being comprised within and made a part of a contract prepared in blank to be entered into with the successful bidder for such street improvement.

On August 3, 1908, an ordinance was passed authorizing the making of the improvement covered by the resolution aforesaid, to be paid for by the issuance of special tax bills, providing, among other things, for the publication for bids and the letting of the work to the lowest and best bidder. Thereafter the city engineer submitted an estimate of the cost of the improvement; and upon bids being received defendant Owen was the successful bidder, and a contract was duly entered into with him of date August 20, 1908.

The contractor sublet the work of putting in the curbing to one Hendricks, as the contract permitted. It appears that the work both upon the paving of the street and the putting in of the curbing progressed with reasonable speed, and was completed by December 25, 1908, but it seems that the curbing cracked and crumbled in places, requiring it to be repaired, which, on account of unfavorable weather conditions, was not done until April, 1909. This having been done, the city engineer reported that the entire work had been completed in substantial compliance with the contract, and the same was thereupon accepted and, by an ordinance approved May 4, 1909, tax bills were ordered to be issued to pay the cost thereof.

Such further details of the evidence as it may be necessary to notice in connection with the questions raised on appeal will be referred to in the course of the opinion.

I. The point is made that the resolution declaring the improvement necessary is too vague and uncertain in its terms, in that certain distances and dimen-

sions are not shown; but it is clear that these are sufficiently supplied by the plans and specifications filed by the city engineer in the office of the city clerk, which by specific reference were incorporated into the resolution. [See *Bridewell v. Cockrell*, 122 Mo. App. 196, l. c. 203, 99 S. W. 22.] An examination of the resolution shows clearly that it fully complies with the requirements of the statute, viz., sections 9254 and 9255, Revised Statutes 1909, applicable to cities of the third class.

II. It is urged that there was no estimate of the cost of the improvement within the contemplation of the statute, *supra*. But this contention is likewise without merit. The estimate filed by the city engineer gave the estimated cost of paving the street, stating separately the estimated cost per square yard of the foundation, sand cushions, fillers and brick surface, which aggregated \$1.75 per yard for the finished pavement. The cost of the curbing was estimated at sixty cents per lineal foot. And it was estimated that there would be 14,207.2 square yards of paving and 6546 lineal feet of curbing, the cost of the whole totaling \$24,995.60.

It is altogether clear that the estimate is sufficient. A number of cases are cited in support of appellant's position, but they are without influence particularly in view of the recent ruling of the Supreme Court in *Boonville v. Stephens*, 238 Mo. 339, 141 S. W. 1111, where an estimate was held sufficient in which the engineer merely stated that in compliance with his duty as city engineer he had computed the cost of paving the street and found "that the work should be done at a cost not to exceed \$1.47 per square yard." This ruling we followed in *Gratz v. City of Kirkwood*, 182 Mo. App. 581, 166 S. W. 319, and it is conclusive here.

III. It is insisted by appellant that the assessment is void because of the failure of the contractor to complete the work within the time limit.

The ordinance above referred to, authorizing the improvement, provided that the work should be completed on or before January 1, 1909, but that days lost in consequence of any restraining order or court proceedings or bad weather should be added to the time specified. And the contract provided that the work should be completed on or before January 1, 1909, "unless delayed by restraining orders, court proceedings, or bad weather, and the council of the city of Mexico shall grant an extension of time therefor."

It appears that both the paving and the curbing were fully constructed by December 25, 1908, and the whole street thrown open to traffic, though the curbing had crumbled or "flaked" off in places. There was much evidence to the effect that the damages to the curbing was occasioned by the freezing of the newly made concrete at times, during the progress of the work. On the part of plaintiff it was sought to show that the condition of the curbing was due to poor workmanship and an improper mixture of the concrete; but the evidence well supports the conclusion which the trial court evidently reached that the defects in the curbing were due to the fact that the temperature at times fell below the freezing point, particularly at night, while the curbing was being installed, whereby parts thereof were damaged.

On or about December 28, 1908, the city engineer reported that the work had been completed in substantial compliance with the plans and specifications therefor. It appears, however, that plaintiff, who had opposed the improvement from the beginning, and some other citizens, protested against the acceptance of the work; and on February 8, 1909, an ordinance was passed which recited that some defects in the curbing had developed by reason of the "winter weather," and which purported to postpone the acceptance of the work on account of bad weather, in accordance with the ordinance and contract under which the same was

done; the contractor being thereby required to comply with his contract as soon as it was reasonably possible to do so, "taking into consideration the condition of the weather as suitable to said work."

Thereafter, in April, 1909, and, it is said, as soon as the work could safely be done, defects in the curbing were remedied, under the direction of the city engineer, who, it appears, required the resurfacing thereof for the length of an entire block wherever repairing was necessary in such block, so that it would not present an appearance of "patchwork." On May 3, 1909, the engineer renewed his report to the mayor and council, to the effect that the work had been completed in compliance with the contract, stating that the contractor had repaired all of the aforesaid defects in the curbing. And thereupon the work was duly accepted and the issuance of the taxbills therefor authorized.

Appellant's contention is that the time for completing the work expired January 1, 1909, and that the municipal authorities were without power thereafter to authorize an extension of time and revitalize the contract, and that the assessment for the work, and the taxbills predicated thereupon are necessarily void, citing: *Neill v. Gates*, 152 Mo. 585, 54 S. W. 460; *Hund v. Rockcliffe*, 192 Mo. 312, 91 S. W. 500; *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163; *Schibel v. Merrill*, 185 Mo. l. c. 550, 83 S. W. 1069; *Paving Co. v. Munn*, 185 Mo. l. c. 569, 83 S. W. 1062; *Montague v. Kalmeyer & Co.*, 138 Mo. App. 288, 120 S. W. 637; *Construction Co. v. Coal Co.*, 205 Mo. 49, 103 S. W. 93. But it is quite clear that the doctrine invoked by appellant has here no application, and a review of the foregoing cases is unnecessary. Neither the ordinance authorizing the improvement, nor the contract, unconditionally required the work to be completed within a definite specified time. The controlling provisions of the ordinance, upon which the provisions of the contract to the same general effect are predicated, are that days lost on ac-



count of bad weather shall be added to the time specified. It cannot be said, therefore, that the time limit expired January 1, 1909, for the contract was necessarily kept alive during such time as it would be reasonable to allow on account of weather conditions.

It appears that the work had been, at least, substantially completed prior to January 1, 1909, and the street thrown open to traffic; and that all that was thereafter done was to remedy certain minor defects which had developed in the curbing as stated above. Certainly, in view of the aforesaid ordinance provisions, if not otherwise, the contractor ought to be afforded reasonable opportunity to remedy such defects. In this connection see *Curtice v. Schmidt*, 202 Mo. 703, 101 S. W. 61; *Gist v. Construction Co.*, 224 Mo. 369, 123 S. W. 921.

We, therefore, rule the point against appellant.

IV. Appellant asserts that the original taxbill, which the petition sought to cancel, was void because issued against three lots jointly; that the defendants recognized this by causing it to be withdrawn and cancelled; and that therefore plaintiff was entitled to a decree. But as the question arises and is here presented, it is unnecessary for us to determine whether the original taxbill should on this account be regarded as absolutely void, or the defect viewed as a mere irregularity which could be corrected by issuing amended or corrected taxbills in lieu of the original. There appears to be authority to support the contention that the original taxbill was void because issued against three lots jointly. [See *Riley v. Stewart*, 50 Mo. App. 594.] But as to this we express no opinion.

If the original taxbill was rendered absolutely void, for the reasons urged, then, we think, it must follow that there was no such cloud thereby placed upon plaintiff's title as to call for the exercise of the equitable powers of the court to remove it, and that

plaintiff was not entitled to maintain a bill in equity seeking to obtain the relief here sought. If the taxbill was absolutely void, for the reasons stated, then the defect, which rendered it so, was one apparent upon the face of the tax proceedings, and upon the face of the taxbill itself. In such cases equity will not interfere, though the rule is otherwise where the title, lien or claim, which is said to cast a cloud upon plaintiff's title, appears to be valid upon its face, and the invalidity asserted therein is one which requires extrinsic evidence to establish it. [See *Turner v. Hunter*, 225 Mo. 71, 123 S. W. 1097; *Hannibal & St. J. R. Co. v. Norton*, 154 Mo. 142, 55 S. W. 220; *Verdin v. St. Louis*, 131 Mo. 26, 32 S. W. 480, 36 S. W. 52; *Henman v. Westheimer*, 110 Mo. App. 191, 85 S. W. 101; *Perkins v. Baer*, 95 Mo. App. 70, 68 S. W. 939.] What is said by BURGESS, J., in *Verdin v. St. Louis*, *supra*, to the effect that equity will nevertheless interfere where the defect is such as to require legal acumen to discover it, is not here applicable, and whether it is to be regarded as the law in this State we do not decide. [See *Turner v. Hunter*, *supra*, l. c. 83; *Henman v. Westheimer*, *supra*, l. c. 195.]

The prime object of plaintiff's suit is to remove the cloud said to be cast upon its title by the apparent lien of the taxbill. In fact it is under this head of equity jurisprudence that plaintiff's case must proceed. [See *Verdin v. St. Louis*, *supra*, l. c. 114.] Under the statute (section 9254, Revised Statutes 1909) the taxbill is made a lien for a period of fixe years, "after date of issue," unless sooner paid. The time of the commencement of the lien is determined by the statute creating it. [See *Jaicks v. Sullivan*, 128 Mo. 177, 30 S. W. 890; *Everett v. Marston*, 186 Mo. l. c. 599, 85 S. W. 540.] Since the lien has its inception at the date of the issuance of the taxbill, if the original taxbill was absolutely void, no lien arose under it, and this appeared on the face of the proceedings themselves

and on the very face of the taxbill. And if such be true then there was no such cloud cast upon plaintiff's title as would entitle it to maintain a bill in equity to remove the same.

On the other hand, if the issuance of the original taxbill against the three lots is to be regarded as a mere irregularity, then the error of the clerk in so issuing it may be corrected by the issuance of amended or corrected taxbills in lieu thereof. [Kiley v. Cranor, 51 Mo. 541; Stodler v. Roth, 59 Mo. 400; Galbreath v. Newton, 45 Mo. App. 312.] In such event, though the original taxbill was irregularly issued, nevertheless a lien arose at the date of the issuance thereof, which could be perfected by the timely issuance of amended taxbills. [See, also, Gruner Lumber Co. v. Hartshorn-Barber Realty & Bldg. Co., 171 Mo. App. 614, 154 S. W. 846.]

In any event, plaintiff is not entitled to a decree because of the fact alone that the original taxbill was issued against three lots, and we may well allow this phase of the matter to rest here.

V. It appears that the three new taxbills were signed by one Willard Potts, who was mayor when the original taxbills were issued for this work and who signed all of them, but who was out of office when the new bills were issued; and it is contended that he was without authority to thus act after the expiration of his term of office. But that the former mayor had authority to sign the three taxbills in question, after the expiration of his term of office, to take the place of the one previously issued and signed by him as mayor, and that he alone was lawfully authorized to act in the premises, is sanctioned by the rulings in Kiley v. Cranor; Stodler v. Roth; Galbreath v. Newton, *supra*. We therefore hold that the new taxbills were not for this reason invalid.

VI. Much of the contest below waged about the question of performance of the contract on the part of the contractor, plaintiff averring and seeking to show that the street was not paved and curbed in accordance with plans and specifications, whereby the taxbills therefor were rendered void. Respecting this matter a great mass of testimony was adduced pro and con, which is preserved in the voluminous record before us; and it is pressed upon us that a review of this testimony will reveal that many of the requirements of the specifications filed and embraced within the contract were not complied with. It is said that the concrete for the curbing was not prepared as the specifications required, the sand used not of the kind and quality specified, and that the finished curbing was not of the required dimensions, or the requisite quality; that much of the rock foundation for the street did not meet the requirements as to the size and quality of the rocks permitted to be used; that inferior brick was used; and that neither was the foundation constructed or the brick surface laid in compliance with the various details of the methods required by the specifications to be pursued.

The learned chancellor below, however, found against plaintiff's said contentions, and a careful scrutiny of the entire record has convinced us that his findings ought not to be disturbed. It appears that there was at least a substantial and reasonable compliance with the ordinance and contract provisions in good faith, throughout the performance of the work, which is all that the law requires. [Cole v. Skrainka, 105 Mo. l. c. 309, 16 S. W. 491; Steffen v. Fox, 124 Mo. l. c. 635, 28 S. W. 70; Porter v. Paving Co., 214 Mo. 1, 112 S. W. 235; Gist v. Construction Co., 224 Mo. 369, 123 S. W. 921; City of St. Louis v. Ruecking, 232 Mo. 325, 134 S. W. 657; Meyers v. Wood, 173 Mo. App. 564, 158 S. W. 909.]

Though the proceeding is *in invitum*, and the law, jealously safeguarding the substantial rights of the citizen, does not permit his property to be burdened with a lien for such improvements unless the contractor has, in good faith, fairly and substantially complied with the terms and conditions of his undertaking, according to the true spirit and intent thereof, it is not the policy of the courts to demand a highly technical, literal compliance with the contract stipulations, without regard to the obvious intent and purpose thereof, for such would tend to defeat the very objects of the law authorizing municipalities to provide and contract for the making of improvements of this character.

From the record before us, we conclude that an abutting property owner has here no just ground to complain of the manner in which the work in question was done by the contractor under his contract.

VII. Nor do we see any objection to permitting the defendant contractor to enforce the lien of the three taxbills set up by him by way of counterclaims. The right to enforce the lien of a taxbill under such circumstances, as a counterclaim, in the nature of a cross-bill, appears to be within the purview of the first subdivision of section 1807, Revised Statutes 1909, as being a cause of action arising out of the "transaction set forth in the petition as the foundation of plaintiff's claim or connected with the subject of the action." [And see *Chicago, etc., Ry. Co. v. Bank*, 134 U. S. 276.]

VIII. The court found that there was due upon each of the three new taxbills \$379.16, the amount named therein, together with interest thereon at eight per cent per annum from the said date of issue, amounting to \$28.07; making a total of \$407.03 found to be due upon each bill. Appellant complains of the allowance of any interest prior to the entry of the judgment.

As to this, respondent asserts that appellant did not specifically complain of the allowance of any interest in its motion for a new trial, but that such motion must be taken as complaining of the allowance of interest from the issuance of the new taxbills, instead of from thirty days thereafter. [See Sec. 9254, R. S. 1909.] One ground of the motion is, that "the court erred in allowing interest on the taxbills from the date they were issued;" and another is that "the verdict and finding is excessive." These, we think, sufficed to preserve appellant's right to question here the above-mentioned findings of the court as to the interest allowable.

The statute provides that the city may cause special taxbills for such improvements, to bear eight per cent interest, to begin thirty days after issue. [Sec. 9254, *supra*.] But the taxbills in suit do not by their terms purport to bear interest at all; and neither does the ordinance authorizing the improvement, nor that levying the assessment and providing for the issuance of the taxbills, make any provision as to interest. It is said that such provision is made by a general ordinance of the city, but the record before us does not contain such ordinance or show that it was introduced in evidence, and it may not be considered, whatever might otherwise be its effect.

Liens of this character are created solely by the due exercise of the powers granted by law to the municipal corporation, and dependent thereupon; and are not to be extended by implication. [See *Everett v. Marsten*, 186 Mo. l. c. 599, 85 S. W. 540.] And though the statute authorizes the municipality to make certain provisions as to interest upon such taxbills, the interest allowable thereupon, to be included within the amount chargeable as a lien, cannot be extended beyond the terms and provisions of the ordinances and the taxbills issued in conformity thereto. [See *Springfield ex rel. v. Kirby*, 73 Mo. App. 640.]

It follows that the judgment below enforces the lien in question for a sum which is excessive by the amount of interest allowed upon the three taxbills and included therein; though the judgment itself properly bears six per cent interest under the general statute.

If respondent within ten days shall remit the amount of the aforesaid interest, to-wit, \$86.01, the judgment will be affirmed; otherwise it will be reversed and the cause remanded. It is so ordered. *Reynolds, P. J., and Nortoni, J., concur.*

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LEE L. BOWLES, Respondent, v. WILLIAM H.  
PRENTICE, Appellant.

St. Louis Court of Appeals, January 5, 1915.

1. **ANIMALS: Stock Law: Fences.** The Stock Law (Sec. 772, R. S. 1909) supersedes the inclosure statute in those counties in which it has been adopted.
2. ———: ———: ———: **Liability for Trespassing Cattle.** Under the Stock Law (Sec. 772, R. S. 1909), the owner of cattle is liable for damages done by them to the land of another, although such land is unfenced.

Appeal from Lewis Circuit Court.—*Hon. Charles D. Stewart, Judge.*

**AFFIRMED.**

*F. H. McCullough* for appellant.

This suit is based upon section 772, R. S. 1909. Said section cannot apply to the case because the evidence of all parties shows that the stock was not running at large, but was kept in an enclosure fenced by all parties to the suit, with a sort of partition fence between the lands of plaintiff and defendant, which

was maintained by defendant alone, on defendant's land. Section 772, R. S. 1909; *Jackson v. Fulton*, 87 Mo. App. 228; *Jones v. Habberman*, 94 Mo. App. 1; *Gilmore v. Harp*, 92 Mo. App. 77-386. The statute restraining animals from running at large, relates to animals coming upon the premises from the outside, and has no application to the case of adjoining proprietors under a common enclosure. The relations of such proprietors are regulated by the partition fence statute. *Jackson v. Fulton*, 87 Mo. App. 241.

*Hilbert & Henderson* and *A. F. Haney* for respondent.

The effect of the stock law statute is to permit one to allow his field to go unfenced and yet recover damages occasioned by stock running at large. *Jackson v. Fulton*, 87 Mo. App. 228, 241.

NORTONI, J.—This is a suit for damages accrued to plaintiff because of defendant's cattle trespassing upon his premises. Plaintiff recovered and defendant prosecutes the appeal.

It appears that the stock law—that is, section 772, Revised Statutes 1909—restraining animals from running at large, is in force in Lewis county, and the suit proceeds thereunder. Plaintiff and defendant own and reside upon adjoining farms in Lewis county. The two places are separated by the Little Fabius river—that is to say, the plaintiff's farm, consisting of forty acres, lies east and north of the Little Fabius river, while the farm of defendant is on the opposite side of the stream. It is said the river marks the line between them. The evidence is, that no division or partition fence is maintained by the parties between their farms, and, indeed, no such fence was ever established or maintained. Moreover, the parties do not adjoin



fences at any point. Touching this matter, the evidence is:

“Q. On direct examination I believe you said that Mr. Prentice’s fence does not adjoin you anywhere?  
A. It does not.”

As before said, the Little Fabius river marks the line between the two farms, and plaintiff maintained no fence whatever, but defendant maintained a wire fence on his side of the river, upon his own land. It appears defendant’s cattle, at pasture within his inclosure on the opposite side of the river, escaped therefrom by some means and trespassed upon plaintiff’s fields so as to destroy his corn and other crops.

It is argued the court erred in submitting the case to the jury for the reason that the stock law applies to outside fences only and is without influence in those cases where it appears the cattle escaped from a neighboring field under a common outside inclosure through a division fence, and came upon the land of an adjoining proprietor. The case of *Jackson v. Fulton*, 87 Mo. App. 228, is relied upon, but it is obviously not in point. There, the two adjoining landowners occupied each his own land under a common outside inclosure with no established partition fence between them. But here there appears to be no common outside inclosure for the two farms, and, indeed, the evidence is direct and positive that the fences of the two proprietors do not adjoin at all anywhere. Also it appears that there is no division or partition fence between them. The Little Fabius river marked the dividing line between the premises of plaintiff and defendant and plaintiff maintained no fence at all, either on his own account or in connection with defendant.

That the stock law statute supersedes the inclosure statute in counties where it is adopted and that its effect is to permit one to allow his fields to go unfenced and yet recover damages occasioned by stock running at large and entering thereon, is not ques-

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Vansickle v. Drainage District.

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tioned. [See *Jackson v. Fulton*, 87 Mo. App. 228, 241.] Plaintiff was not required to fence his field from the incursions of the stock of others and he omitted to do so. There is no question of a common inclosure for the two fields, neither is there one concerning a division fence in the case, and it appears that defendant's cattle, which the stock law required him to keep impounded, escaped from his premises and entered upon those of plaintiff, to his damage. It does not appear from whence the cattle came upon the premises of plaintiff whether through defendant's fence on his own land and across the creek or from some other quarter, and the case is clearly one falling within the protection of the statute dispensing with the obligation to fence against cattle running at large.

The judgment should be affirmed. It is so ordered.  
*Reynolds, P. J.*, and *Allen, J.*, concur.

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JOHN R. VANSICKLE, Appellant, v. DRAINAGE  
DISTRICT NO. 1, Respondent.

St. Louis Court of Appeals, January 5, 1915.

**DRAINAGE DISTRICTS: Damages to Land: Res Adjudicata.** An owner of lands within a drainage district organized under Sec. 5578, R. S. 1909 *et seq.*, cannot recover from the district for damages to his land caused by the flooding thereof and the pollution of his well from water flowing through the ditch, since it is conclusively presumed that the viewers allowed damages for such injuries, pursuant to Sec. 5586, and therefore, the question is *res adjudicata*, whether the owner availed himself of his rights under the statute or not.

Appeal from Knox Circuit Court.—*Hon. Charles D. Stewart*, Judge.

**AFFIRMED.**

*C. M. Smith and G. R. Balthrope* for appellant.

*F. H. McCullough and D. A. Rouner* for respondent.

NORTONI, J.—Plaintiff prosecutes this appeal from a judgment of the court sustaining a demurrer to his petition.

Defendant is a drainage district, organized under the statute, and plaintiff owns a farm within the district situate on the Salt river bottoms, in Knox county. The petition states the defendant drainage district was organized and incorporated by a proper proceeding in the county court of Knox county, under the provisions of the act concerning the drainage of swamp and overflowed lands, approved April 7, 1909. [See Laws of Missouri, 1905, page 180, et seq.] It is averred, too, that plaintiff owns about 200 acres of land in the Salt river bottoms and within and affected by the defendant drainage district. It then proceeds to complain of defendant, to the effect that it carelessly and negligently injured and depreciated the value of plaintiff's land so situate within the district, by causing ditches to be washed across the land and pools of water to accumulate thereon, destroying his well, etc. It is set forth in the petition that plaintiff's land is lower than other land within the district upstream, and that, at the point where the drainage ditch commenced, the bank of Salt river was about eight feet high; that the drainage ditch constructed by defendant under the statutes at the point of beginning intercepted the river where its bank was high and permitted the water to flow through the same and over plaintiff's lowland where the banks of the drainage ditch were only two and one-half feet high. Because of this plaintiff prays a recovery in damages and also equitable relief.

The court very properly sustained the demurrer to the petition, for obviously the damages complained

of were taken into account by the viewers, and now lie within the realm of *res adjudicata*. The act under which the drainage district is organized provides for a competent board of viewers, who, after being duly sworn, shall ascertain, among other things, the damages, if any, to be compensated on account of lands prejudicially affected within the district by the construction of the proposed ditch. Moreover, all persons whose lands may be affected by the ditch are authorized to appear before the viewers and freely express themselves with respect to all matters pertaining thereto.

Section 8286, Laws of Missouri, 1905, page 183, besides authorizing the viewers to condemn the right of way and allow damages therefor, after deducting benefits to such landowners as are benefited, authorizes them to allow compensation for damages to such lands as are not benefited. Any person whose lands are affected by the proposed improvement may file exceptions to the report of the viewers in the county court, under section 8292, and a trial with respect to the subject-matter is there provided for before the latter tribunal. If such exceptions of the landowners are overruled, an appeal may be had by the landowner, on proper application. On such appeal, the statute provides there may be determined either or both of the following questions: First, whether compensation has been allowed for property appropriated, and second, whether proper damages have been allowed for property prejudicially affected by the improvements. [See section 8292, Laws of Missouri, 1905, page 185.] Section 8294, Laws of Missouri, 1905, page 186, provides if the owner or persons interested in the land, appropriated or damaged by the proposed ditch or other improvement, fail to file written exceptions, as provided in section 8292 to the award made by the viewers touching the land so appropriated or damaged, such

owner or person interested shall be deemed to have acquiesced in such award.

It does not appear from the petition whether plaintiff filed exceptions to the report of the viewers or not, but this is immaterial, for the fact that the remedy was open to him under the express provisions referred to concludes the matter as to the damages claimed here. Manifestly the damages complained of—that is, such as resulted to plaintiff's land within the district from the establishment of the drain—fall within the purview of the viewers or commissioners in performing their office under the statute. In this suit, collateral to the proceeding establishing the district, it is conclusively presumed the viewers considered and adjudicated all matters of damages falling within the scope of their authority, and especially is this true where the petition, as here, contains no averment to the contrary. It is clear that the damages to plaintiff's land within the district so prejudicially affected as by permitting the water to come from the river through the ditch and overflow his premises so as to wash ditches therein, accumulate pools thereon, and pollute the water in his well relate to the very subject-matter within the contemplation of the viewers authorized to assess damages and the amount of compensation to be paid to landowners either not benefited by the district or to set off damages against benefits in cases where such were proper with respect to lands benefited.

The question made on these facts has been expressly decided several times in the neighboring State of Illinois as one of *res adjudicata* as to such damages to lands within the district. [See *McGillis v. Willis*, 39 Ill. App. 311; *Elmore v. Drainage Commissioners*, 135 Ill. 269; *Russell, etc. Drainage District v. Pinkstaff*, 41 Ill. App. 504.] The case of *Bungenstock v. Nishnabotna Drainage District*, 163 Mo. 198, 64 S. W. 149, relied upon by plaintiff, is not in point, for there

the suit concerned and sought a recovery for damages occasioned by the drainage district to lands not within the district. However, even in that case, the court clearly recognized the principle that one may not recover on account of damages to land within the district presumed to have been compensated theretofore.

The judgment should be affirmed. It is so ordered.  
*Reynolds, P. J., and Allen, J., concur.*

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**THEKLA MEIERHOFF, Respondent, v. UNITED  
RAILWAYS COMPANY OF ST. LOUIS, Appel-  
lant.**

St. Louis Court of Appeals, January 5, 1915.

1. **STREET RAILWAYS: Injury to Intended Passenger at Station: Degree of Care.** One who was struck and killed by an interurban car while crossing the track from a station on one side thereof to a platform on the other side, for the purpose of boarding the car, even if not a passenger, was an invitee whose presence the operators of the car were bound to anticipate and for whose safety they were required to exercise special care, and it was negligence for them to run the car past the station at a high rate of speed, without taking any precautions for the safety of such person.
2. ———: ———: **Contributory Negligence.** One who was struck and killed by an interurban car while crossing the track from a station on one side thereof to a platform on the other side, for the purpose of boarding the car, was not required to exercise the same care for his own safety as is required of a trespasser or even of a pedestrian at a highway crossing, since he had the right to assume that the operators of the car would take special precautions for his safety, and hence the question of whether he was guilty of contributory negligence was for the jury.

Appeal from St. Louis County Circuit Court.—*Hon. G.  
A. Wurdeman, Judge.*

**AFFIRMED.**

*Boyle & Priest and T. M. Pierce* for appellant.

(1) The court should have peremptorily instructed the jury to render a verdict in favor of the appellant: (a) No actionable negligence was proved against the appellant. *Pope v. Railroad*, 242 Mo. 232; *Kinlen v. Railroad*, 216 Mo. 145; *Boyd v. Railroad*, 105 Mo. 371; *Moody v. Railroad*, 68 Mo. 470; *Roefeldt v. Railroad*, 180 Mo. 567. (b) The deceased was guilty of contributory negligence as a matter of law. *Reeves v. Railroad*, 251 Mo. 169; *Laun v. Railroad*, 216 Mo. 563; *Farris v. Railroad*, 167 Mo. App. 392. (2) Plaintiff's instruction number 1 is erroneous—(a) It was made the duty of the motorman in charge of the car to attempt to stop it when he saw the plaintiff's husband passing over the tracks without regard as to whether he was in apparent peril at the time. *McGee v. Railroad*, 153 Mo. App. 492; *Roefeldt v. Railroad*, 180 Mo. 554. (b) This instruction broadened the negligence based on the humanitarian doctrine, the only negligence pleaded, so as to include negligence based on failure to see. *McQuade v. Railroad*, 200 Mo. 150; *Politowitz v. Telephone Co.*, 115 Mo. App. 57; *Black v. Railroad*, 217 Mo. 672; *Stid v. Railroad*, 236 Mo. 382; *Schumacher v. Brewing Co.*, 247 Mo. 141.

*John P. Leahy and Frank H. Sullivan* for respondent.

(1) The demurrer to the evidence was properly overruled because: (a) Appellant having invited deceased to make use of the facilities provided to await and reach its cars, was bound to so operate its cars as that he might do so with safety. *Burbridge v. Cable Co.*, 36 Mo. App. 669; *Karr v. Railroad*, 132 Wis. 666; *Warner v. Railroad*, 168 U. S. 345; *Chunn v. Railroad*, 207 U. S. 302; *Canham v. Rhode Island Co.*, 85 Atl. 1051; *Dickemann v. Railroad*, 121 N. W. 682;

Copeland v. Railroad, 67 N. Y. App. Div. 486, S. C. 78, App. Div. 420, S. C. 177, N. Y. 570; Railroad v. Hammerly, 40 Mo. App. Cas. D. C. 199. (b) Deceased had the right to assume that appellant's cars would be so operated as that he might pass from the waiting room to the platform with safety; and hence he was not guilty of contributory negligence. Authorities, *supra*. (c) Even if there is no more in the case than the application of the humanitarian doctrine, the testimony is ample to prove that appellant was bound to anticipate the presence of persons crossing its tracks at the point where the accident occurred, and that the operative of the car discovered deceased, or might have done so, in time to have avoided striking him. Criss v. United Railways, 166 S. W. 837; Feldman v. Railroad, 175 Mo. App. 636; Walker v. Railroad, 173 Mo. App. 84; Windle v. Railroad, 168 Mo. App. 603; Zander v. Transit Co., 206 Mo. 464; Pendenville v. Transit Co., 128 Mo. App. 602; Peterie v. Railroad, 177 Mo. App. 366; Johnson v. Traction Co., 176 Mo. App. 190; McGee v. Power Co., 153 Mo. App. 498. (2) Instruction number 1 was properly given. Authorities *supra*, 1 (a).

NORTONI, J.—This is a suit under the wrongful death statute for damages accrued to plaintiff through defendant's negligence. Plaintiff recovered and defendant prosecutes the appeal.

Plaintiff is the widow of Adolph Meierhoff, who came to his death through being run upon by one of defendant's trolley cars. Defendant owns and operates a railroad and line of suburban electric cars between the city of St. Louis and Creve Coeur Lake in St. Louis county. Plaintiff's husband came to his death in December, 1910, through being run upon by one of defendant's cars, about 6:15 o'clock in the morning, while darkness prevailed, at Overland Park station, on defendant's railroad. Overland Park station



is in a rural neighborhood outside of the city and is a place maintained by defendant for the reception and discharge of passengers. Plaintiff's husband met his death while in the act of crossing defendant's tracks from the station house on the south to the passenger platform on the north, with a view of boarding the car which ran upon him, and the question for consideration relates to this matter, for the reason defendant argues no recovery should be allowed, because, first, it does not appear defendant was remiss in its duty, and, second, it is said decedent should be declared guilty of negligence as a matter of law for having attempted to pass in front of an approaching car. But the argument is without avail, for that, whether a passenger or not, decedent was an invitee of defendant at the time and place he was run upon by the car and his presence there was within the range of reasonable probabilities to be anticipated by defendant in the exercise of due care. Moreover, he was justified in assuming, through the assurance of safety involved in the circumstances, that defendant would so operate its cars as to protect him, and he was thus relieved from exercising the care for his own safety that should attend the movements of either a trespasser on the track or a pedestrian on a highway in nowise invited by defendant to be present.

It appears defendant maintains double car tracks running east and west through the small suburban settlement known as Overland Park, and the north track is occupied by cars going westward, while the south track by cars moving eastward. Defendant had constructed and maintained, for the accommodation of persons desiring to take or alight from its cars at Overland Park, two separate cinder platforms. One of these platforms was on the south side of the south track, and adjacent thereto stood a small station house for the use of passengers. There is some controversy in the case as to whether or not defendant owned the station house, but it is abundantly shown that it stood

—in part at least—on defendant's right of way; that defendant's employees placed it there; and that it was constantly used by passengers with the knowledge and consent of defendant; moreover, the jury found the fact to be that defendant maintained it for such purpose. On the side of the track opposite to the station house and the cinder platform adjacent to it, but about thirty feet to the westward, defendant had constructed another cinder platform for the use of passengers going upon and alighting from its westbound cars on the north or westbound track. The cinder platform adjacent to the station house on the south side of the south track was constructed for and used by passengers boarding and alighting from the cars going east, and, as before said, this platform was about thirty feet farther east than the one on the opposite side for westbound passengers. Between these two cinder platforms on either side of the railroad, defendant had constructed a pathway of cinders across the two tracks for the use of passengers passing to and from the station house. This cinder pathway across the tracks commenced at the station house on the south and proceeded to the northwest at an angle of about forty-five degrees until it connected with the cinder platform provided for westbound service on the north side of the north track. The patrons of defendant railroad constantly used this cinder pathway across the tracks from the station to the platform on the opposite side for the purpose for which it was provided—that is, in crossing from the station to the platform—when desiring to board a westbound car.

Plaintiff and her husband resided at Overland Park and he was engaged at a brickyard in St. Louis county, some several miles to the westward. Rodgers, the superintendent of the brickyard, likewise resided at Overland Park and it was the custom for the two men to go to and from their work together on defendant's cars. They usually boarded the westbound car

in the morning about 6:15 o'clock for transportation to their place of employment. On the day in question, Rodgers, the superintendent, and Meierhoff, the decedent, were within defendant's station house awaiting the approach of the 6:15 car, when a car suddenly came in view, about 600 feet to the eastward, at Verona. The date was December fifth, and it was so dark that Rodgers carried a lantern. On hearing the sounding of the gong on the car as it approached Verona station, 600 feet to the eastward, Rodgers looked through the window of the station house, said to Meierhoff, "Here is our car," picked up the lantern, and walked across the tracks on the cinder pathway to the passenger landing for westbound cars on the opposite side, and plaintiff's husband, Meierhoff, followed immediately in his rear and to the left. The evidence is the two men walked "briskly" across the tracks on the cinder pathway provided by defendant, toward the platform on the opposite side, but talked the while, and Rodgers carried in his right hand the lantern which gave forth a brilliant light. Both were facing, of course, to the northwest, for defendant had so constructed the pathway from the station house to the platform, and the car which ran upon Meierhoff was approaching from the eastward. The car was brilliantly lighted and the evidence is that it collided with Meierhoff, causing his immediate death, just as he was stepping off of the north track, while running at a speed of from thirty to sixty miles per hour, grazed the coat of Rodgers, who carried the lantern, and did not stop until some two or three hundred feet beyond. It appears that defendant operated two lines of cars over the same tracks—one known as a "through" car, destined to Creve Coeur Lake, the end of the line, and the other as a "tripper," destined to a point known as Crow's Nest, some distance east of Creve Coeur Lake, at which place the "tripper" made the loop for the return trip east. The cars were alike and did not

differ from the usual pattern. The car which ran upon and caused the death of plaintiff's husband was a "tripper," destined to Crow's Nest only, while decedent and Rodgers desired to take the regular car for their work beyond that place, and it is true neither would have boarded the "tripper" had it stopped. However, the "tripper" was running on the time of the regular car, and it appeared to the parties to be the car for which they were waiting.

There is an argument put forward on these facts to the effect that "trippers" did not stop at this particular station and, therefore, no obligation obtained to look out for passengers desiring to take one there, but even if the proposition be sound, the evidence does not sustain the view in which it is advanced, for the witness says sometimes the "tripper" stopped and sometimes it did not, as, of course, is usual, for it depended upon whether there were passengers to be received or discharged at that place. The evidence is entirely clear that plaintiff's husband came to his death while an invitee at a point on defendant's tracks provided for him to pass with a view of taking an approaching car, and this, too, at a station where defendant was in duty bound to be on the lookout for passengers intending to board any of its conveyances, whether "through" cars or "trippers."

The argument on the part of appellant proceeds as if the right of recovery is asserted under the humanitarian rule, and it is said the judgment may not be sustained for the reason it does not appear defendant could have stopped the car and averted the collision after the motorman saw, or might have seen, plaintiff's husband in a position of peril. But obviously this argument is beside the case, for the theory of the law invoked is not the humanitarian rule but rather that plaintiff's husband was an invitee of defendant at its station at the time and place in question, under circumstances which impelled defendant to exer-

cise care in looking out for his presence and guarding his safety while engaged in the act of obtaining an appropriate position to board its car as a passenger. There can be no doubt of the doctrine relied upon, for it reckons with the peculiar facts and circumstances involved in such cases, to the end of assuring to a high degree the safety of invitees on the station grounds intending to become passengers on the conveyance of the carrier, through imposing the obligation on those in charge of the approaching car to be constantly on the lookout for such persons—that is, by exercising special care toward ascertaining their presence and in so managing the car as to prevent injury to them. Manifestly, the dictates of experience on the part of mankind suggest that the precepts of special care should attend such a situation. Here, defendant invited decedent Meierhoff to occupy the station house on the cold December morning while awaiting the approach of the car, and invited him, too, on seeing the car advancing 600 feet away, to leave the station house, as he did, and pursue the cinder pathway it had provided across the tracks to the platform or stopping place of the car which he sought to board as a passenger. This being true, it was within the range of reasonable probabilities that he should be present there in passing across the tracks at the time the car approached, and the case is, therefore, wholly dissimilar from one involving a trespasser on the tracks or even that of a pedestrian at the crossing of a public highway. Due care in such circumstances required defendant to anticipate decedent's presence and look out for his safety by slowing down the speed of the car while in company with Rodgers, who carried the lantern, he was seen to be crossing the tracks. The evidence is, that the tracks from the eastward were straight and the view was open, and there can be no doubt that the motorman either saw, or by exercising care might have seen, the two men with the lantern

crossing the tracks to the passenger platform beyond. It is entirely clear that defendant was remiss in its duty on the occasion in question, and the authorities so declaring the rule are abundant. [See *Warner v. Baltimore & Ohio R. R. Co.*, 168 U. S. 339; *Karr v. Milwaukee, etc. Traction Co.*, 132 Wis. 662; *Chunn v. City & Suburban Ry. etc.*, 207 U. S. 302; *Burbridge v. Kansas City Cable R. R. Co.*, 36 Mo. App. 669; *Great Falls, etc. R. R. Co. v. Hammerly*, 40 App. Cas. Dist. of Columbia, 196; *Canham v. Rhode Island Co.*, 35 R. I. 177, 85 Atl. 1050.]

But it is said no recovery may be allowed because decedent was negligent for his own safety, in that he attempted to cross the tracks immediately in front of an approaching car. The special circumstances above adverted to relieved plaintiff's husband, in a measure, from the obligation to look and listen for the approach of a car immediately before stepping upon the track, because, as an invitee there, he was justified in assuming defendant would exercise due care with respect to him. The evidence is the car was 150 feet distant when Meierhoff and Rodgers stepped upon the north track on which the collision occurred, and it does not appear that either one then knew the great speed at which it was moving toward them. Indeed, they were facing northwest following the cinder path as defendant had invited them to do and the car moving west was, therefore, partly in the rear. Obviously it cannot be said, as a matter of law, that an ordinarily prudent person in the circumstances stated, desiring to board the car from the opposite side of the track would not venture to cross on the pathway provided, when the car was 150 feet away and approaching a stopping place. With respect to this subject-matter, too, the instant case is to be distinguished from that of a trespasser or a pedestrian on the track, for it is said the invitee, approaching the place provided for the reception of passengers, viewed as a reasonably prudent man in the

exercise of ordinary care for his own safety, may well believe that, in view of such implied invitation to cross, the movement of the approaching cars will be so regulated or adjusted as to permit him to do so in safety. In this view, the rule with respect to contributory negligence, though not absolved, is relaxed, in a measure, in order to effectuate the ends of justice in keeping with the attendant facts and circumstances. The question is, therefore, usually one, as in this case, for the jury. [See *Warner v. Baltimore & Ohio R. R. Co.*, 168 U. S. 339; *Karr v. Milwaukee, etc. Traction Co.*, 132 Wis. 662, 668; *Burbridge v. Kansas City Cable R. R. Co.*, 36 Mo. App. 669.]

What has been said sufficiently disposes of the argument directed against plaintiff's first instruction, and it is unnecessary to prolong the opinion with respect to that matter.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

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GEORGE MARTIN, Respondent, v. UNITED RAILWAYS COMPANY OF ST. LOUIS, Appellant.

St. Louis Court of Appeals, January 5, 1915.

1. **TRIAL PRACTICE: Conflicting Evidence: Questions for Jury.** The question is for the jury when the evidence with respect to it is conflicting.
2. **STREET RAILWAYS: Injury to Pedestrian: Violation of Vigilant Watch Ordinance: Sufficiency of Evidence.** In an action for injuries to a person struck by a street car while walking near the track, evidence that plaintiff was in plain view of the motorman as the car approached and that the car could have been stopped within two feet, *held* to warrant the submission of the case to the jury on the question as to whether the motorman failed to keep a "vigilant watch," as required by a municipal ordinance, or, if he kept such watch, whether he was negligent in failing to stop the car, or, at least, sound the gong.

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Martin v. United Railways Co.

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3. ———: ———: **Vigilant Watch Ordinance: Last Chance Doctrine: Pleading.** In an action for injuries to a person struck by a street car, where the petition counted on the violation of the Vigilant Watch Ordinance of the city of St. Louis, enjoining upon motormen the duty to keep a vigilant watch for persons on or approaching the track, and to stop the car in the shortest time and space possible, upon the first appearance of danger to such person, an instruction authorizing a recovery under the last chance doctrine was not erroneous, on the ground that such doctrine was not pleaded, since such ordinance is merely declaratory of the last chance doctrine; the two being identical in their practical import and application.
4. ———: ———: **Instructions: Use of Streets.** In an action for injuries to a person struck by a street car while walking near the track, an instruction, that defendant was not entitled to the exclusive use of the street, and that it was the duty of defendant, in using said street, to operate its cars thereon with the same care and vigilance that would be exercised by a person of ordinary care and prudence, and that, in the exercise of such care, it was the duty of the motorman operating the car which struck plaintiff to be on the watch for persons on the tracks of defendant or approaching said tracks, was not erroneous, on the theory that it misled the jury into believing that plaintiff had a right on the track, or adjacent thereto, equal to defendant, since, notwithstanding a street railway company's right to use that part of the street occupied by its tracks is paramount to the right of pedestrians thereon, nevertheless pedestrians have the unquestioned right to walk upon the track, subject, however, to the duty to leave it, when necessary to do so, for the movement of cars, and the instruction merely refers in general terms to the use of the street and accurately states the law concerning that matter, together with the attendant duty resting upon defendant in using it.

Appeal from St. Louis County Circuit Court.—*Hon. G. A. Wurdeman*, Judge.

**AFFIRMED.**

*Boyle & Priest, J. C. Kiskaddon and A. H. Kiskaddon* for appellant.

(1) Where the evidence introduced by plaintiff shows clearly that he was guilty of negligence which contributes to his injury, he cannot recover, and a de-



murrer to the evidence ought to be sustained. *Hudson v. Railroad*, 101 Mo. 13; *Sherman v. Transit Co.*, 103 Mo. App. 515; *McGrath v. Transit Co.*, 197 Mo. 97; *Moore v. Railroad*, 176 Mo. 528; *Holland v. Railroad*, 210 Mo. 338; *Culberson v. Railroad*, 140 Mo. 35; *Watson v. Railroad*, 133 Md. 246; *Hornstein v. Railroad*, 195 Mo. 440. (2) Street cars running on a fixed track have the right of way. *Culberson v. Railroad*, 140 Mo. 35; *Booth on Street Railways* (2 Ed.), sec. 303; *Elliott on Roads & Highways* (3 Ed.), sec. 961; *Moore v. Railroad*, 126 Mo. 265. (3) Instructions 1 and 2 given at the instance of plaintiff are erroneous. Under the pleadings and evidence there is no room in this case for invoking the humanitarian doctrine. The petition does not plead such a state of facts as would authorize such instructions, nor does the evidence warrant them. There is no evidence of "reckless, wilful or wanton" conduct of defendant's servants. *McGrath v. Transit Co.*, 197 Mo. 97; *Orcutt v. Building Co.*, 201 Mo. 424; *Moore v. Railroad*, 176 Mo. 528; *Kons v. Railroad*, 178 Mo. 591; *Deane v. Transit Co.*, 192 Mo. 575; *Nivert v. Railroad*, 232 Mo. 626; *Pope v. Railroad*, 242 Mo. 232; *Clark v. Railroad*, 242 Mo. 570.

*Lewis & Rice* for respondent.

(1) Although the plaintiff may have been guilty of negligence by placing himself in a position of peril this does not preclude his recovery provided such negligence did not contribute directly to the injury. *Moore v. Railroad*, 126 Mo. 265; *Sullivan v. Railroad*, 117 Mo. 214. (2) Apart from all else, the "Vigilant Watch Ordinance" of the city of St. Louis imposes on the persons in charge of street cars the duty to keep a vigilant watch and on the first appearance of danger to persons or vehicles to stop the car in the shortest time and space possible. The right of way which a street railway possesses is not such a right of way which excludes

the public from a reasonable use of the streets, nor which justifies the running down and injuring of persons upon or near the track. *Moore v. Transit Co.*, 126 Mo. 265; *Blyston-Spencer v. Railroad*, 152 Mo. App. 118. (3) It has been the law in Missouri for half a century that common-law negligence and negligence made so by statute or ordinance (such as the Vigilant Watch Ordinance) can be pleaded in the same count of a petition and recovery allowed on proof of all or one or more of these specifications. The allegations in the petition in this case, and the evidence presented, support the plaintiff's instructions 1 and 2 and furnish the proper basis for invoking the humanitarian doctrine in this case. *Clark v. Railroad*, 242 Mo. 570; *Wacher v. St. Louis Transit Co.*, 108 Mo. App. 645; *Haley v. Railroad*, 197 Mo. 15; *White v. Railroad*, 202 Mo. 539. (6) It is the law of this State that, although an injured party may have been guilty of negligence, by placing himself in a position of peril, yet if defendant, by the exercise of ordinary care, did see him in such position, or by the exercise of such ordinary care could have seen him in such position, in time to have averted the injury, then the defendant is liable. *Matz v. Railroad*, 217 Mo. 275; *Spencer v. St. Louis Transit Co.*, 222 Mo. 310; *Clark v. Railroad*, 242 Mo. 570; *Murphy v. Railroad*, 228 Mo. 56-79; *Sullivan v. Railroad*, 117 Mo. 214; 1 *Shearman & Redfield on Negligence* (4 Ed.), sec. 99; *Ellis v. Metropolitan Ry.*, 234 Mo. 657; *Shipley v. Railroad*, 144 Mo. App. 7; *Feeney v. Railroad*, 123 Mo. App. 420; *Powell v. Railroad*, 59 Mo. 626; *White v. Railroad*, 202 Mo. 539.

NORTONI, J.—This is a suit for damages accrued to plaintiff on account of personal injuries received through defendant's negligence. Plaintiff recovered and defendant prosecutes the appeal.

Plaintiff was run upon and injured by one of defendant's cars while walking in the public street near

the tracks, in circumstances that suggest his injury might have been obviated by due care on the part of the motorman. It appears plaintiff, an old gentleman, aged eighty-one years at the time, was walking north on the sidewalk on the east side of Sixth street in St. Louis, and crossed Morgan street with a view of continuing his journey, but was interrupted in further following the sidewalk because of its apparent obstruction through the erection of a building there. Immediately north of Morgan street and on the east side of Sixth street a building was in the course of construction, and, though a canopy had been erected over the sidewalk for the protection of pedestrians, men were, nevertheless, going out and in the building with wheelbarrows, and, therefore, the passageway on the sidewalk seemed to be encumbered. Because of this, plaintiff turned off of the walk and into the street by walking around a pile of brick and building material adjacent to the curb and wended his way to the northward along near the east rail of the east car track. Defendant owns and maintains two car tracks running north and south in Sixth street, at the point in question, and the track on the east was occupied by northbound cars while the track on the west by cars moving to the southward.

While plaintiff was in the street and walking northward, about two feet east of the east rail of the east car track, defendant's northbound car ran upon him from behind, it is said, without sounding a gong or giving other warning of approach, and inflicted the injuries complained of. The place of the collision was about sixty feet north of Morgan street and, as before stated, near the middle of Sixth street immediately west of the new building under construction. It appears defendant's northbound car, occupying the east track on Sixth street, stopped adjacent to the northeast corner of Sixth and Morgan streets to take on or discharge passengers and then moved slowly forward

but a short distance until it ran upon plaintiff so walking in the street within one or two feet of the rail of the track. The hour was about 10:30 o'clock in the forenoon and the view open and clear. There is evidence tending to prove that the motorman was at his post in the forward end of the car with the lever controlling the power in hand and so situate as to see plaintiff and his every movement. Plaintiff was walking slowly looking at a workman pulling a wheelbarrow, and the car came slowly on behind him without a sound of the gong or other warning, according to the evidence most favorable to his cause, collided with him, precipitated him forward to his injury, and stopped about ten feet beyond. Morgan, the workman with the wheelbarrow, observed the dangerous situation of plaintiff and "hollered" out to the motorman to stop or "you will kill the man," when the street car was some ten or twelve feet away—that is, while it was yet ten or twelve feet south of plaintiff. Notwithstanding this warning and the fact that plaintiff was in full view of the motorman all of the time, the car was not stopped, if the evidence of plaintiff's witnesses is believed, until it had passed ten feet beyond the point of collision. It is in evidence that the car could have been stopped at the rate of speed it was going at the time within the distance of two feet, with the appliances at hand, and, indeed, the motorman says he actually stopped it within two feet after colliding with plaintiff. However, it is the theory of defendant, and the evidence of the motorman tends to prove, that plaintiff was not in a situation of peril at first, but was walking to the northward in the street some four feet east of the car track and suddenly stepped over in front of the moving car when it was but two and one-half feet distant from him, and in this wise received his injury. Of course, the question concerning this matter was one for the jury.

The petition pleads the Vigilant Watch Ordinance of St. Louis, and counts upon a breach of it, in that it is averred defendant's servant in charge of the car negligently failed to keep a vigilant watch for persons on or near the track and failed to stop the car in time to avoid injuring plaintiff, though, by exercising ordinary care, he could have observed plaintiff in a position of peril and stopped the car in time to have averted injuring him. It is urged the court should have directed a verdict for defendant because there is no evidence to the effect that the motorman did not keep a vigilant watch ahead. But, obviously, this argument is without merit. The evidence is abundant that plaintiff was in plain view of the approaching car and that the motorman was stationed in a position to see him in a situation of peril. If the motorman saw plaintiff, then it is to be inferred he was remiss in his duty in failing to stop the car, or, at least, sound the gong; and if he did not see plaintiff, he could have done so by exercising ordinary care to that end, and it appears the car could have been stopped at the rate it was going within two feet. Morgan, the workman standing by, says he "hollered" at the motorman to stop the car or "you will kill the man," when the car was yet ten or twelve feet away. It is entirely clear the case was one for the jury.

The instructions are well and carefully drawn and submit the question to the jury on the hypothesis that plaintiff was negligent for his own safety at the time, but authorize a recovery under the last clear chance doctrine. In view of this, it is argued the judgment should be reversed, for it is said the last clear chance or humanitarian doctrine is in nowise counted upon in the petition but rather the vigilant watch ordinance is invoked. This argument is without merit, too, for the courts have frequently declared that the Vigilant Watch Ordinance is merely declaratory of the municipality's approval of what is called the hu-

manitarian, or last chance, doctrine. In their practical import and application, the two are identical and the same, in so far as the instant case is concerned. The court very properly instructed the jury in this view. [See *Kaiser v. United Rys. Co.*, 155 Mo. App. 428, 135 S. W. 90; *Gebhardt v. St. Louis Transit Co.*, 97 Mo. App. 373, 71 S. W. 448; *Mertens v. St. Louis Transit Co.*, 122 Mo. App. 304, 99 S. W. 512; *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, 88 S. W. 648.]

Among other things, the court instructed the jury at the instance of plaintiff as follows:

“The court instructs the jury that on the 5th day of November, 1910, the defendant was not entitled to the exclusive use of said Sixth street between Morgan street and Franklin avenue in said city of St. Louis, and that it was the duty of the defendant in using said street to operate its cars thereon with the same care and vigilance which would be exercised by a person of ordinary care and prudence, and that in the exercise of such care it was the duty of the motorman operating the car which struck plaintiff to be on the watch for persons on the tracks of defendant or approaching said tracks.”

It is argued this instruction was prejudicial to defendant because it misled the jury into believing that plaintiff had a right on the car track, or adjacent to the track, equal to that of defendant; but we are not so persuaded. It is true the instruction informs the jury that defendant was not entitled to the exclusive use of Sixth street between Morgan and Franklin avenues, but there can be no doubt of the proposition so stated. The remaining portion of the instruction is in nowise criticized. Although the Supreme Court has declared a street railway company's right to use that part of the street occupied by its tracks is paramount to the right of a pedestrian thereon, it has said, too, that such pedestrians have the unquestioned right to walk upon the track as well, when laid in a public street,

subject, however, to the duty to leave it, when necessary to do so for the movement of the cars. [See *Moore v. Kansas City, etc., Ry. Co.*, 126 Mo. 265, 29 S. W. 9.] Accepting this to be the sound law, it is entirely clear that the instruction above copied in no wise misled the jury, for it referred in general terms to the use of the street and accurately stated the law of the case concerning that subject-matter, together with the attendant duty resting upon defendant in using it. It is certain this instruction does not constitute reversible error.

The judgment should be affirmed. It is so ordered.  
*Reynolds, P. J.*, and *Allen, J.*, concur.

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FRITZ W. WIEMANN, Appellant, v. C. J. STEFFEN,  
Respondent.

St. Louis Court of Appeals, January 5, 1915.

1. **REAL ESTATE: Contracts for Sale: Implied Covenants.** The law implies that one selling land shall furnish a good title, and a "good title" means a "marketable title."
2. ———: ———: ———: **Marketable Title: Title Under Statute of Limitations.** If a contract for the sale of land specifically provides for a title of a particular kind and character, as a title shown of record, or by means of an abstract, a title so evidenced must be given; but if the contract is to furnish a good and marketable title, free from defects, it is complied with by tendering a good title by adverse possession under the Statute of Limitations.
3. ———: ———: ———: **"Marketable Title."** An agreement, in a contract for the sale of land, to furnish a marketable title, free from defects, contains no implied covenant that the title will be such as the purchaser will be willing to accept or such as his attorney may pronounce good and marketable; a "marketable title" being one which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing and ought to accept.

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Wiemann v. Steffen.

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Appeal from Montgomery Circuit Court.—*Hon. James D. Barnett*, Judge.

**AFFIRMED.**

*Avery, Young, Dudley & Killam and Nowlin & Hughes* for appellant.

(1) The title tendered the plaintiff by the defendant by the deed was not a marketable title. *Birge v. Bock*, 44 Mo. App. 69; *Thompson v. Dickerson*, 68 Mo. App. 535; *Simmons v. McIlroy*, 73 Am. State 677; *Simon v. Vandever*, 63 Am. State 688; *Moore v. Williams*, 115 N. Y. 586; Vol. 26 Cyc., page 808; *Zurke v. Kuehn*, 113 Wis. 421. (2) The respondent by his false affidavit showing the fact that Alice Creech, who afterward married Story, was living at the time of the death of the mother, Leana Creech, cannot gain an advantage. *Dorrance v. Dorrance*, 165 S. W. 786; *Crane v. Murry*, 106 Mo. App. 280; *Gordon v. Bruner*, 49 Mo. 570. (3) The respondent in failing and refusing to give appellant the possession of the buildings on the 2nd day of March, 1911, was in default and the appellant had the right to rescind for this reason. (4) The construction placed upon the contract by the conduct of the parties shows that an abstract title was to be furnished, therefore proof of title by adverse possession would be eliminated. 173 Mo. App. 666; *Ives v. Kimlin*, 140 Mo. App. 293; *Austin v. Shipman*, 160 Mo. App. 206.

*Frank Howell and R. L. Sutton* for respondent.

(1) The title tendered plaintiff by defendant was a "marketable title," as that term is defined by the courts. *Kling v. Realty Company*, 166 Mo. App. 195; *Summy v. Ramsey*, 53 Wash. 93; *Scannell v. American Soda Fountain Company*, 161 Mo. 619; *Adkinson v. Taylor*, 34 Mo. App. 452. (2) A title based upon the Statute of Limitations is a good and marketable title,



and one which the purchaser has no right to reject, where the contract does not expressly require the title to be evidenced by the records. *Scannell v. American Soda Fountain Company*, 161 Mo. 617; *Long v. Lackawana Coal & Iron Company*, 233 Mo. 713; *Pratt v. Eby*, 67 Pa. 396; *Hedderly v. Johnson*, 42 Minn. 443; *Mitchner v. Holmes*, 117 Mo. 185; *Kling v. Realty Co.*, 166 Mo. App. 190; *Summy v. Ramsey*, 53 Wash. 93; *Rozier v. Graham*, 146 Mo. 355; *Mastin v. Grimes*, 88 Mo. 490; *Green v. Ditsch*, 143 Mo. 12; *Thompson v. Dickerson*, 68 Mo. App. 543; *St. Clair v. Hellweg*, 173 Mo. App. 666. (3) The conduct of the parties in jointly procuring an abstract did not convert the contract of sale, which was a contract for a good and marketable title simply, into a contract for a good and marketable title to be shown by an abstract of the record. *St. Clair v. Hellweg*, 173 Mo. App. 660; *Long v. Lackawana Coal & Iron Company*, 233 Mo. 720, 739. (4) The interest of the Story heir, if any he had, is as effectually barred by the Statute of Limitations, as it could have been barred by deed. *Scannell v. American Soda Fountain Company*, 161 Mo. 617; *Long v. Lackawana Coal & Iron Company*, 233 Mo. 739; *Hutson v. Hutson*, 139 Mo. 236; *Warfield v. Lindell*, 38 Mo. 580; *Lapeyre v. Paul*, 47 Mo. 590; *Warfield v. Lindell*, 30 Mo. 286; *Misenheimer v. Amos*, 221 Mo. 371; *Gray v. Ward*, 234 Mo. 297; *Nickey v. Leader*, 235 Mo. 42; *Clapp v. Bromagham*, 9 Cow. 530; *Gobardus v. Trinity Church*, 4 Paige, 178; *Town v. Needham*, 3 Paige, 545; *Florence v. Hopkins*, 46 N. Y. 186; *Baker v. Oakwood*, 123 N. Y. 16, 25 N. E. 312; *Sweetland v. Buell*, 69 N. Y. St. 733, 35 N. Y. Supp. 346; *Foulke v. Bond*, 41 N. J. Law, 527; *Long v. Stapp*, 49 Mo. 508; *Campbell v. The Laclede Gas Co.*, 84 Mo. 375; *Hendricks v. Musgrove*, 183 Mo. 301; R. S. Mo. 1909, sec. 1881. (5) The interest to which the title is disputed is so insignificant as compared with the entire tract of land involved in the contract of sale, being

only a one-thirty-second part thereof, that it would not justify a rescission of the contract of sale, even though the title to this small interest were conceded to be bad. *Hart v. Hanlin*, 43 Mo. 175; *Lockett v. Williamson*, 31 Mo. 54; 3 *Parsons on Contracts*, 400. (6) Time is not generally deemed to be of the essence of the contract, either at law or in equity. It is only required that neither party be permitted to abuse the matter of time to the disadvantage of the other. *Scannell v. American Soda Fountain Company*, 161 Mo. 621; *Summy v. Ramsey*, 53 Wash. 93; *Carr v. Howell*, 154 Cal. 372; *East Jellico Coal Co. v. Carter*, 30 Ky. Law, 174; *Jones v. Robbins*, 29 Maine, 351; *Moore v. Smedburgh*, 8 Paige, 600; *Fulenwider v. Rowan*, 136 Ala. 287; *Steele v. Branch*, 40 Cal. 3; *Acosta v. Anderson*, 56 Fla. 749; *Ellis v. Bryant*, 120 Ga. 890; *Maris v. Masters*, 31 Ind. App. 235; *Sandford v. Weeks*, 38 Kan. 319; *Gilman v. Smith*, 71 Md. 171; *Boston, etc. v. Rose*, 194 Mass. 142; *Munro v. Edwards*, 87 Mich. 112; *Sylvester v. Born*, 132 Pa. St. 467. (7) The court has found the issues against plaintiff, under instruction number 2 given by the court at plaintiff's request, and there is an end of the matter. Plaintiff will not be permitted to take a position here inconsistent with that taken in the court below. *Berger v. St. Louis, etc., Co.*, 136 Mo. App. 36; *Carey v. Metropolitan Street Ry. Co.*, 125 Mo. App. 188; *Tomlinson v. Ellison*, 104 Mo. 201; *Smith v. Huff*, 141 Mo. App. 476; *Montgomery v. Wise*, 138 Mo. App. 176; *Jenkins v. Clopton*, 141 Mo. App. 74; *Crain v. Miles*, 154 Mo. App. 338. (8) The failure of plaintiff to point out to defendant his objections to the title, prior to bringing his action, is a complete bar to a recovery in this case. *Easton v. Montgomery*, 90 Cal. 307; *Kling v. Realty Co.*, 166 Mo. App. 194; *Ashbaugh v. Murphy*, 90 Ill. 182; *Brewer v. Winchester*, 2 Allen (Mass.) 389; *Copertind v. Oppermann*, 76 Cal. 181; *Packard v. Usher*, 7 Gray (Mass.) 529; *Schmidtke v. Keller*, 44 Oregon, 23;

*Rightor v. Kohn*, 16 La. 501; *Carty v. Steam Cotton Press Co.*, 5 La. 16; *St. Clair v. Hellweg*, 173 Mo. App. 660; *Scannell v. American Soda Fountain Co.*, 161 Mo. 614; *Thompson v. Dickerson*, 68 Mo. App. 535. (9) The failure of plaintiff to specify in his petition the defect in the title relied on, is fatal to his action. *Pohiem v. Meyers*, 9 Cal. App. 31; *Axtel v. Chase*, 77 Ind. 74; *Duvall v. Parker*, 2 Duv. (Ky.) 182; *Lewis v. Morton*, 5 T. B. Mon. (Ky.) 1; *Latham v. Morgan, Sm. & M. Ch. (Miss.)* 611; *Duvall v. Parker*, 2 Duv. (Ky.) 182. (10) (a) The deed from George B. East and wife to Leonah Creech and "her bodily heirs" at common law would create an estate tail special or an estate tail male. *Washburn on Real Property* (3 Ed.), sections 22, 23 and 26, pages 87, 88; 16 Cyc. 609 B; *Tiedeman on Real Property* (1 Ed.), sec. 48. (b) This estate tail male—or special—was converted by our laws into a life estate in Leannah Creech and the remainder in fee in the male heirs of her body who would have taken it under the common law at her death, or male descendants who can trace their line back to the donee through males. *Wash. on Real Property* (3 Ed.), sec. 33, p. 90, and sec. 37, p. 91; *Tiedeman on Real Property*, sec. 48; *Phillips v. La-Forge*, 89 Mo. 72; *General Statutes Mo. 1865*, sec. 4, p. 442; *Farrar v. Chrysty's Admrs.*, 24 Mo. 453.

NORTONI, J.—This is a suit for money had and received. The money sued for came into the hands of defendant under a contract which plaintiff thereafter rescinded. The trial was had before the court without a jury, where the finding and judgment were for defendant, and plaintiff prosecutes the appeal.

It appears that plaintiff and defendant entered into a written contract concerning the purchase of defendant's farm of 238 acres in Lincoln county. By the terms of the contract, plaintiff purchased defendant's farm at the agreed price of \$11,700, and paid \$500

down as earnest money thereon. It was agreed that the balance of the purchase price should be paid in part, and in part secured by plaintiff to defendant, on the first day of March, 1911, at which time the deed was to be executed by defendant and his wife and delivered to plaintiff and possession of the premises given. It is stipulated in the written contract that defendant should, on that date, make and deliver to plaintiff "a general warranty deed to said lands with good and marketable title, free from all liens and defects except taxes due for the year 1911." The controversy in the case relates to this matter, for the plaintiff insists that defendant did not tender a marketable title, whereas the court found he did.

Plaintiff paid \$500 earnest money on the bargain when the contract was entered into several months before, and it appears that he was ready, able and willing to complete the purchase on March 1, 1911, and, indeed, extended the time until noon of March 2 of that year, to enable defendant to clear several defects in the title. Although there is no stipulation in the contract requiring defendant to furnish an abstract, it appears that he did so and plaintiff's attorney examined it prior to March first. On such examination several minor defects in the paper title were discovered and pointed out, and it appears defendant corrected all of them save one which relates to the apparent outstanding title of a one-eighth interest in sixty-five acres of the land, which title, it is said, according to the records, resides in one Joseph Story. It appears that defendant had claimed to own the land for more than thirty-two years under a general warranty deed, and that, though he had resided thereon, cultivated it, paid the taxes, and exercised the usual acts of ownership with respect to it during that time, plaintiff objected to the title tendered because of such apparent outstanding one-eighth interest in sixty-five acres in Joseph Story. After waiting until noon of March 2,

1911, for defendant to correct the record title with respect to this interest, plaintiff declared a rescission of the contract and demanded the return of the \$500 earnest money paid, because, as he asserts, the title tendered was not good and marketable, free from all defects. On the other hand, defendant insisted the title was sufficient, when considered together with his occupancy and claim of ownership under the Statute of Limitations and, therefore, denied plaintiff's right to rescind.

The case concedes that Joseph Story derived from his grandmother, through descent, in 1896, title to a one-eighth interest in the parcel of land referred to, consisting of sixty-five acres, and no deed from him appears. But, on the trial, the court received evidence showing that defendant's right to the identical land and interest had ripened into a complete title under the Statute of Limitations through adverse user and occupancy under claim and color of title attended with the usual indicia of ownership. But this evidence was objected to on the theory that the stipulation for a marketable title required the showing of such title by deeds or proper conveyances and excluded the idea by establishing it through user under the Statute of Limitations. Moreover, the court refused to declare the law, on plaintiff's request, to the effect that he was not obligated to accept from defendant a title resting as to any part of the land contracted for by him on the Statute of Limitations.

It is urged the court erred in its view of the law thus disclosed, in that the covenant for a marketable title, free of defects, implies a title to be shown in proper conveyances alone, and may not be satisfied through showing an absolutely good title under the Statute of Limitations. But we are not so persuaded. The law implies that one selling land shall furnish a good title and it is said that a good title and a marketable title are the same. [See *Kent & Obear v. Allen*,

24 Mo. 98; *Kling v. A. H. Greef Realty Co.*, 166 Mo. App. 190, 148 S. W. 203; 39 Cyc. 1442; 29 Am. & Eng. Encyc. Law (2 Ed.), pp. 610, 611.] However, sometimes the parties stipulate in their contract, and it is certainly competent for them to do so, for a title of a particular kind and character, even where otherwise a different character of title would be sufficient; such, for instance, as where the contract specifically provides that the title shall be shown of record or by means of an abstract. In cases of that character, of course, it is essential to comply with the condition of the contract and show a title of record or as by an abstract, etc. [See *Thompson v. Dickerson*, 68 Mo. App. 535; *St. Clair v. Hellweg*, 173 Mo. App. 660, 159 S. W. 17; 39 Cyc. 1442, 1445, 1446, 1447.] But the term "marketable title, free from defects," does not imply that no other title than one shown in proper conveyances or of record or revealed in an abstract from the record will suffice. Neither is there an implied covenant in those words to the effect that the title will be such as the vendee will be willing to accept or that his attorney may pronounce good and marketable. [See *Green v. Ditsch*, 143 Mo. 1, 44 S. W. 799.] It is said that the words "marketable title" mean a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept. [See *Kling v. Greef Realty Co.*, 166 Mo. App. 190, 195, 196, 148 S. W. 203; *Todd v. Savings Institution*, 128 N. Y. 636; 29 Am. & Eng. Encyc. of Law (2 Ed.), 613; 39 Cyc. 1452, et seq.] But unless the contract calls for a record title or a title appearing in conveyances, as by an abstract or something of that nature, a good title by adverse possession under the Statute of Limitations is sufficient and regarded as a marketable title. It is said that such is the rule according to the great weight

of authority. [See 39 Cyc. 1460.] It is certainly the rule in Missouri, as will appear by reference to the decision of the Supreme Court in *Scannell v. American Soda Fountain Co.*, 161 Mo. 606, 618, 619, 61 S. W. 889.

The law on the subject is thus stated in 39 Cyc. 1460, 1461, 1462, 1463:

“Where the contract expressly or impliedly calls for a record title, a title by adverse possession, prescription, or limitations, is not sufficient; but such a title is marketable and sufficient, according to the great weight of authority, where the contract does not call for a title of record. Where there is a possibility of an outstanding title, undisturbed possession for a long period of time renders the title marketable. The vendor must, however, clearly show that the facts are such that lapse of time gives title by adverse possession and that the title is free from reasonable doubt. He must be able to show that the adverse claimant of the property was not under such disability that the statute would not run against him, that the possession was in hostility to such owner and exclusive, and that the time prescribed by the statute has not been prolonged by any act of the parties. The parol evidence to support such a title must be such as cannot be contradicted and will not be difficult to obtain.”

In this view the court very properly received the evidence showing good title in the defendant under the Statute of Limitations and also in refusing the instructions requested by plaintiff, for it is obvious the title tendered by defendant was a marketable one free from defects.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

JOSEPH MOORE, Respondent, v. AMERICAN  
EXPRESS COMPANY, Appellant.

St. Louis Court of Appeals, January 5, 1915.

1. **MASTER AND SERVANT: Injury to Servant: Safe Place to Work: Assumption of Risk.** Where the superintendent of defendant's stables and a servant whose duties made it necessary that he should go into the stalls both knew that one of the horses was vicious and would kick, and the servant suggested that such horse should be put into a box stall, but was told by the superintendent that all he had to do was to be careful and he would not be hurt, he did not assume the risk of an injury from the horse kicking him when he approached it with due care, since a servant assumes only such risks as are ordinarily incident to the employment and the injury arose out of the master's negligent failure to exercise ordinary care to furnish the servant a reasonably safe place in which to work.
2. ———: ———: ———: ———: **Reliance on Master's Promise.** Where the superintendent of defendant's stables and a servant whose duties made it necessary that he should go into the stalls both knew that one of the horses was vicious and would kick, and the servant suggested that such horse should be put into a box stall, but was told by the superintendent that all he had to do was to be careful and he would not be hurt, such statement by the superintendent conveyed an assurance of safety to the servant, in the event he was careful; the rule that an experienced servant may not rely on an assurance of safety from an inexperienced master, where the servant knows more of the attendant dangers than the master does, not being applicable, since the superintendent possessed full and complete knowledge pertaining to the vicious propensities of the horse. [REYNOLDS, P. J., dissents.]

Appeal from St. Louis City Circuit Court.—*Hon.*  
*Thomas C. Hennings*, Judge.

**AFFIRMED.**

*Watts, Gentry & Lee* for appellant.

(1) The court erred in overruling this defendant's demurrers to the evidence. A servant injured by



a vicious horse is entitled to recover from his master only in the event that the vicious disposition of the horse was known to the master, or could have been known to him by the exercise of ordinary care, and was not known to the servant, and that the master failed to warn the servant of the disposition of the horse though he knew the servant was ignorant of it. On the other hand, if the servant knows the horse's disposition as well as his master does and continues in the employment, he cannot recover. *Bessemer Land, etc., Co. v. Dubose*, 125 Ala. 422; *Leigh v. Railroad*, 36 Neb. 131; *Railroad v. Bresmer*, 97 Pa. 103; *Cooper v. Porter Brewing Co.*, 112 Ga. 894; *Milby v. Dow Coal & Mining Co.*, 104 S. W. 860; *Arkansas Smokeless Coal Co. v. Pippins*, 122 S. W. 113; *Eastman v. Scott*, 182 Mass. 192; *Wilson v. Mining Co.*, 16 Utah, 392; *Knickerbocker Ice Co. v. Finn*, 80 Fed. 483; *Wooster v. Bliss*, 90 Hun 79; *Wilson v. Doyle*, 17 Sc. Sess. cases (4 Series), 62; *Fraser v. Hood*, 15 Sc. Sess. cases (4 Series), 178; *Cooper v. Cashman*, 190 Mass. 75; *Stutzke v. Ice Co.*, 156 Mo. App. 1; 2 *Cooley on Torts* (3 Ed.), p. 693 (404); *Inghams on Animals*, sec. 94; *Conn. v. Hunsberger*, 25 L. R. A. (N. S.) 372; 4 *Thompson on Neg.*, sec. 4041; *Douglas v. Scandia Coal Co.*, 141 N. W. 960; *Althardt v. Consolidated Coal Co.*, 165 Ill. App. 504; *Armington v. Providence Ice Co.*, 33 R. I. 484; *McGovern v. Fitzpatrick*, 151 N. Y. Supp. 148. The same rule applies to other animals. *Farley v. Picard*, 29 N. Y. Supp. 802; *Miller v. McKesson*, 13 N. Y. 195; *Clark v. Railroad*, 179 Mo. 66. A servant cannot rely upon the master's assurance that a certain thing is all right, when the servant, by his own experience, knows positively that it is not all right and has better means of knowledge than the master has. *Knorpp v. Wagner*, 195 Mo. 637. The cases in this State allowing recovery by a servant for injuries caused by vicious animals owned by his master do not go the length contended for by plaintiff in this case

and are not authority for upholding the verdict in the case at bar. They merely allow recovery where the master has notice and plaintiff has not. *McCready v. Stepp*, 104 Mo. App. 340; *Stutzke v. Consumers' Ice Co.*, 156 Mo. App. 1. The rule in other States is the same. *Miller v. Kelly Coal Co.*, 239 Ill. 626; *Knickerbocker Ice Co. v. Finn*, 80 Fed. 483; *Arkansas Smokeless Coal Co. v. Pippins*, 92 Ark. 138; *Leigh v. Railroad*, 36 Neb. 131. The objection to the application of the rule of assumption of risk which is usually made by our courts in cases of defective appliances is not available in such a case as this. A defective appliance can be thrown away or repaired, but a horse's disposition cannot be changed nor would it be right for the owner to sell the horse to another person without revealing what the horse's disposition was, and as soon as that fact was revealed, the prospective purchaser would decline to buy. It is necessary that the horse should be fed. Where the horse is as bad and vicious as plaintiff testified defendant's horse was and it was well known to plaintiff the risk of being kicked is a necessary risk incident to the feeding of such a horse. The Missouri courts, as well as all others, recognize the rule that a defendant assumes a risk of which he knows and which is not the result of negligence on the master's part. *Clark v. Railroad Co.*, 179 Mo. 66.

*J. F. Coyle* and *Charles E. Morrow* for respondent.

(1) The owner or keeper of a vicious animal such as a horse, after knowledge of its vicious disposition, is absolutely liable for any injury done by it to any person in a place where he has a right to be. The *scienter* is the gist of the action. It is not the mere keeping of a vicious animal, but keeping it with knowledge of its vicious propensities. *Beckett v. Beckett*,

48 Mo. 396; O'Neill v. Blase, 94 Mo. App. 663; Bell v. Leslie, 24 Mo. App. 670; Spring Co. v. Edgar, 99 U. S. 654; Clowdis v. Flume Co., 118 Cal. 315; Marsel v. Bowman, 62 Ia. 315; Muller v. McKesson, 73 N. Y. 195; Rogers v. Rogers, 4 N. Y. St. 373; 2 Cyc. 378, Am. & Eng. Ency. of Law (2 Ed.), 352, 353. Proof of negligence is not necessary. Fowles v. Shellabarger, 50 Mo. 558; Lynch v. McNally, 73 N. Y. 347; Muller v. McKesson, 73 N. Y. 195; Spring Co. v. Edgar, 99 U. S. 654; Strause v. Leipf, 101 Ala. 433, 23 L. R. A. 622; 2 Cyc. 368, 369. (2) It is well settled that a servant can recover for an injury caused by an animal which the master used as a part of his industrial appliances or kept on the premises for other purposes, and if it is vicious or in some other way dangerous to persons doing work by its agency or in its neighborhood and the master was or ought to have been aware of its bad qualities, the master is liable. O'Neill v. Blase, 94 Mo. App. 648; McCreaty v. Stepp, 104 Mo. App. 340; Stultze v. Consumers Ice Co., 156 Mo. App. 1; Cox v. Murphy, 82 Ga. 623; Knickerbocker Ice Co. v. Finn, 80 Fed. 483; Lehigh v. Railroad, 36 Neb. 131; Hammond v. Johnson, 38 Neb. 244; 1 Labatte on Master and Servant, sec. 266; 26 Cyc. 1113; Nooney v. Pacific Express Co., 208 Fed. 274. (a) The defendant's superintendent had actual knowledge of the vicious disposition of the horse and was guilty of negligence in ordering plaintiff to feed the horse by going in the stall from behind and to the side of it. Jones v. American Warehouse Co., 137 N. C. 337; 26 Cyc. 1153. (b) The defendant placed the plaintiff in a position of unusual hazard by instructing him to feed the horse in question, and it was defendant's duty to adopt every reasonable precaution to avoid injury to plaintiff. Defendant should have placed the horse in a box stall where it could have been fed with safety. Claybaugh v. Railroad, 56 Mo. App. 630; Rickhoff v. Heckman, 7 N. Y. Supp. 417; Mack v. Railroad, 123 Mo. App. 531;

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Moore v. Express Co.

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Jerrel v. Blackburg Block Coal Co., 154 Mo. App. 552. (3) Whatever may be the law in other jurisdictions, the doctrine of assumed risk in Missouri is of narrow compass. The servant never assumes the negligence of the master. Kelly v. Railroad, 105 Mo. App. 383; Blanton v. Dole, 109 Mo. 64; Curtis v. McNair, 173 Mo. 270; Daken v. Chase & Sons Mer. Co., 197 Mo. 238; George v. Railroad, 225 Mo. 264. Even under the strict rule followed by the Federal courts plaintiff did not assume the risk. Nooney v. Pacific Express Co., 208 Fed. 274. (a) The defendant's superintendent negligently ordered the plaintiff to feed the horse in question in the manner in which he did feed it, and by his assurance lulled plaintiff into a sense of security to conclude that he could do so without being injured. Such an order and assurance absolves plaintiff from contributory negligence and he does not assume the risk. Nooney v. Pacific Express Co., 208 Fed. 274; Fogus v. Railroad, 50 Mo. App. 263; Buckner v. Stock Yards Co., 221 Mo. 700; Holman v. Souther Iron Co., 152 Mo. App. 672; Bennett v. Crystal Carbonate Co., 146 Mo. App. 565; Schlavick v. Friedman-Shelby Shoe Co., 157 Mo. App. 83; Bloomfield v. Worster Construction Co., 118 Mo. App. 254; Smith v. Kansas City, 125 Mo. App. 150; Erwin v. Tel. Co., 173 Mo. App. 508. (b) At least it was the duty of the defendant as master to provide the servant with a reasonably safe way to feed the horse in question, namely, as shown by the evidence, a box stall where the plaintiff would not be required to go behind and to the side of the horse. This was surely a safe method. The plaintiff objected to feeding the horse in the manner directed, but was overruled by defendant's superintendent. The failure to so provide a safe method is negligence on the part of the defendant which the plaintiff did not assume. Fogus v. Railroad, 50 Mo. App. 263; Adolff v. Columbia, etc., Co., 100 Mo. App. 208; Mack v. Railroad, 123 Mo. App. 531.

NORTONI, J.—This is a suit for damages accrued to plaintiff on account of personal injuries received through being kicked by defendant's horse, and it proceeds on the grounds of negligence. Plaintiff recovered and defendant prosecutes the appeal.

It appears that plaintiff was in the employ of defendant at its stables, and his duties pertained to cleaning harness and feeding a number of defendant's horses. Among the horses assigned to plaintiff to be fed was one known as No. 57. The evidence tends to prove that this horse was vicious, in that it would kick and bite and jump on occasions. There is an abundance of evidence tending to prove that McGowan, defendant's superintendent, was aware of the vicious disposition of the horse and that he had been notified of it several different times. It appears, too, that plaintiff was apprised of the same facts, for he states that he was present when the horse kicked at a negro employee of defendant some months before, and he also heard the negro complain to McGowan, the superintendent, concerning the fact. Plaintiff also says that he had heard one Watrow complain to the superintendent that the horse had kicked at him on another occasion. He also knew the horse kicked one time near the Union Station. Shortly before plaintiff was injured, he had a talk with McGowan, the superintendent, after Watrow was kicked and suggested that McGowan have the horse placed in a box stall where he could feed him without danger of being kicked, and McGowan said, "You go on and take care of that horse in the stall; all you have to do is to be careful, you won't be hurt." A few weeks thereafter, while plaintiff was passing into the stall carrying a measure of oats with which to feed the animal, the horse kicked him, inflicting the injuries complained of, and, moreover, it trampled upon him and became greatly excited for the time. Plaintiff said he did nothing tending to disturb the horse, but

merely said, "Stand over, boy," as he passed into the stall with the oats to feed.

It is argued the court should have directed a verdict for defendant, for it is said a servant may not recover from the master in such circumstances, because it appears that he, as well as the master, knew of the vicious propensities of the horse and must be regarded as having assumed the risk of injuries accruing therefrom. Whatever may be the law on this subject in other jurisdictions, it seems to be settled in this State that the servant assumes only such risks as are ordinarily incident to the employment in which he embarks, and such are said to be risks which arise apart and distinct from those entailed by the master's negligence. In other words, as said in *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167, "He only assumes the risk of that which is liable to happen on account of the nature of the business when the master has used reasonable care to avoid such result." [See, also, *George v. St. Louis & S. F. R. Co.*, 225 Mo. 364, 407, 125 S. W. 196; *Dakan v. Chase & Sons Merc. Co.*, 197 Mo. 238, 266, 267, 94 S. W. 944.] Here, although the suit proceeds on the grounds of negligence between master and servant, the averment is not that defendant furnished plaintiff a defective appliance, but rather that it breached its duty in failing to furnish him a reasonably safe place to perform his work. Plaintiff was not a driver—that is, assigned the task of using the horse in defendant's business—but, as before stated, he was a harness cleaner at the stables whose time was partly occupied in feeding the horses. It appears the horses were stationed in stalls and plaintiff entered within the stall of each beside the horse in the process of feeding. Knowing the disposition of the horse in question, he requested the superintendent to place it in a box stall so that the task of feeding might be performed without encountering the danger of a kick. The petition charges that defendant

breached its duty, not in furnishing plaintiff a vicious horse to feed, but in failing to provide him a reasonable protection as that involved in a box stall while performing his task of feeding a horse which sometimes kicked. In other words, the petition counts rather upon the breach of defendant's obligation to exercise ordinary care in furnishing plaintiff a reasonably safe place to work. If there be negligence with respect of this matter, the risk entailed as a result is one which the servant does not assume by continuing in the employment. [See *George v. St. Louis & S. F. R. Co.*, 225 Mo. 364, 407, 125 S. W. 196.]

It appears defendant might have secured plaintiff's safety in feeding the horse by providing a box stall, and it omitted to do so, although requested. Obviously it may be found that such amounts to a breach of the obligation resting on defendant to exercise ordinary care toward furnishing plaintiff a reasonably safe place in which to work. It is true the superintendent, McGowan, did not promise that a box stall would be provided, but he said: "You go on and take care of that horse in the stall; all you have to do is to be careful, you won't be hurt." These words, of course, convey an assurance of safety to plaintiff, in event he was careful, and the evidence is that he approached the horse on the occasion in question with due care and consideration. Although it be true that an experienced servant may not rely on an assurance of safety from an inexperienced master, where the servant knew more of the attendant dangers than the master did, as is said in *Knorpp v. Wagner*, 195 Mo. 637, 666, 667, 93 S. W. 961, we believe the principle is without influence in the instant case, for here it appears that the superintendent possessed full and complete knowledge pertaining to the horse and the dangers which inhered in the situation as well as did plaintiff. This being true, it is certain that plaintiff may not be treated as an experienced servant possess-

ing full knowledge of the danger and defendant as inexperienced and without such knowledge. Although it be true that plaintiff knew of the disposition of the horse and that it sometimes kicked, we do not feel that he assumed the risk, when it appears the place might have been rendered safe for his work by such slight effort on defendant's part. He made a full statement concerning the horse, requesting a box stall to be provided and was directed by the superintendent to "Go on and take care of the horse in the stall" with the assurance that "All you have to do is to be careful, you won't be hurt." Such a complaint and such an answer in a similar case, it is said by a court of high authority, is tantamount to a complaint with a promise to repair in the case of an ordinary instrumentality. [See *Mooney v. Pacific Express Co.*, 208 Fed. 274.] It appearing that the risk was entailed upon plaintiff through the omission of defendant to exercise ordinary care for his safety, the risk does not fall within the category of those assumed by the servant, according to the rule of decision which obtains in Missouri.

Defendant cites and urges with great force the ruling of the Supreme Court in *Clark v. Missouri, K. & T. R. Co.*, 179 Mo. 66, 77 S. W. 882, as controlling here, but we do not regard the authority in point. It is true that much is said in the opinion in that case, but on the whole the proposition established by the decision amounts to no more than that a servant who is fully advised of the impending danger from the onslaught of a vicious steer may not recover on the breach of the master's obligation to warn against such danger, for, it is said, he knew as much or more than the master could have conveyed through the warning.

The judgment should be affirmed. It is so ordered. *Allen, J.*, concurs; *Reynolds, P. J.*, dissents.



CHARLES L. MAY et al., Respondents, v. CITY OF  
HANNIBAL, Appellant.

St. Louis Court of Appeals, January 5, 1915.

1. **ELECTRICITY: Death of Lineman: Defective Insulation: Sufficiency of Evidence.** In an action for the death of a lineman, caused by his coming in contact with a wire charged with electricity maintained by defendant, evidence *held* sufficient to establish a specific averment in the petition, that the insulation on the wire was worn and rotten, and hence the case was one for the jury.
2. **NEGLIGENCE: Pleading: Specific Negligence.** Where the petition in a negligence case contains both a general and a specific charge of negligence, the former is entirely superseded by the latter.
3. ———: ———: **Res Ipsa Loquitur: Effect of Pleading Specific Negligence: Instructions.** Where the petition in a negligence case contains a general averment of negligence, under which the doctrine of *res ipsa loquitur* would apply, and also alleges specific acts of negligence, such specific allegations render the doctrine of *res ipsa loquitur* inapplicable, and the instructions must require a finding on the specific acts alleged.
4. ———: ———: ———: ———: ———. In an action for the death of a lineman, caused by his coming in contact with a wire charged with electricity maintained by defendant, the petition, after alleging negligence generally, also alleged that the insulation on the wire was worn and rotten. The court charged the jury, at the instance of plaintiff, that if decedent was killed as a direct result of a shock from such wire, that fact was conclusive proof of defective insulation, unless the jury found that the insulation was as safe as it could be reasonably made, that the utmost care had been used to keep it so insulated, and that, while the insulation was in a safe condition, the climbing spur strapped to decedent's foot came in contact with the insulation and punctured it, through no fault of defendant and through no defect in the insulation. *Held*, that the instruction was erroneous, for the reason that it failed to submit the specific acts of negligence pleaded, and because it invoked a presumption of negligence, as though the doctrine of *res ipsa loquitur* were applicable, when the doctrine could not be availed of because specific negligence was pleaded.

Appeal from Hannibal Common Pleas.—*Hon. William T. Ragland*, Judge.

REVERSED AND REMANDED.

*Victor J. Miller* for appellant; *Nelson & Bigger* of counsel.

(1) The court erred in refusing to give appellant's instruction offered at the close of plaintiffs' case. *Chitty v. Railroad*, 148 Mo. 64; *McManamee v. Railroad*, 135 Mo. 447; *Beane v. Transit Co.*, 212 Mo. 331; *Roscoe v. Railroad*, 202 Mo. 587; *Hector v. Boston Electric Light Co.*, 174 Mass. 212; *Jackson v. Butler*, 155 S. W. 1071; *Strayer v. Railroad*, 156 S. W. 735; *Clements v. Electric Co.*, 44 La. 692. (2) The court erred in giving plaintiffs' instruction to the effect that if Louis May received an electric shock from the city of Hannibal's wire, then this fact was conclusive proof of defective insulation, for the reason that no charge of general negligence is made, and plaintiffs were entitled to no instruction which did not confine itself to the allegations of negligence in their petition. *Chitty v. Railroad*, 148 Mo. 64. (3) The court severally erred in refusing to give appellant's instructions numbered 5, 7 and 9. (a) Instruction number 5 was proper for the reason that the failure to give same made the appellant liable even though it had used every precaution to properly insulate wires, and Louis May, by his own contributory negligence, had destroyed the insulation. (b) Instruction number 7 was proper for the reason that plaintiffs alleged specific acts of negligence, and appellant had the right to have submitted to the jury the question whether or not the wire was properly insulated. (c) Instruction number 9 was proper for the reason that the appellant pleaded contributory negligence, and was entitled to an instruction on contributory negligence. (4) The court erred in

giving defendant Bell Telephone Company's instruction offered at the close of the entire case, for the reason that it was a jury question as to whether defendant Bell Telephone Company was liable. (5) The verdict is excessive. *Calcatterra v. Iovaldi*, 123 Mo. App. 347; *Dando v. Telephone Co.*, 126 Mo. App. 242; *Marshall v. Mining Co.*, 119 Mo. App. 270.

*Hall, Robertson & O'Bannon* for respondent.

NORTONI, J.—This is a suit under the wrongful death statute for damages accrued through defendant's negligence with respect to its duty to insulate a wire employed in transmitting electricity. Plaintiff recovered and defendant prosecutes the appeal.

Plaintiff's minor son was in the employ of the Bell Telephone Company at the time of his death, and, while in the line of duty, came in contact with a wire owned by the defendant, city of Hannibal, and employed by it in the transmission of an electric current of high voltage. Because of the insecure insulation of this wire, the electric current was transmitted to decedent and caused his death. Both the present defendant and the Bell Telephone Company were jointly sued, but at the trial the court directed a verdict in favor of the telephone company and referred the case to the jury against the present defendant alone.

It appears plaintiff's son was in a carrier, suspended some twenty feet above the street from a messenger wire of the Bell Telephone Company, at the intersection of Center street and an alley in the city of Hannibal, and, while so seated, was engaged at work on the wires of the Bell Telephone Company. Defendant, city of Hannibal, owned a system of wires through which it transmitted an electric current immediately adjacent to the wires on which decedent was at work, and his foot came in contact with one of defendant's wires. The evidence is, that the instep of

decedent's foot touched the wire and he immediately fell from the carrier to the earth below. A slight abrasion on the limb indicated that he came to his death from an electric shock, and it appears, too, that his neck was broken from the fall.

The case concedes that plaintiff's son was in the line of duty at the time, performing the task assigned him by his employer, the Bell Telephone Company, and that he was thus exposed to contact with defendant's wire at a place where it should have anticipated that the Bell Telephone linemen might be. On the part of plaintiff, the evidence tends to prove that his son came to his death as the result of the contact of his foot with the poorly insulated wire of defendant city. On the other hand, the evidence for defendant tends to prove that the wire was sufficiently and properly insulated, but decedent carelessly brought his steel climbing spur, strapped on to his foot, against the insulation, broke through it by pressing against a cross-arm, and thus received the electric shock from which he died. Besides containing a general allegation of negligence, the petition avers, too, that defendant was negligent in permitting the insulation on defendant's wire through which the electric current was communicated to become worn and rotten.

It is urged the court erred in refusing to direct a verdict for defendant because there is no evidence tending to prove the specifications of negligence so stated—that is, that the insulation on the wire was worn and rotten. But this argument appears to be without merit, for, though the evidence is slight concerning this matter, it is sufficient. Moreover, it appears a section of the wire itself, revealing that portion of the insulation with which decedent's foot came in contact, was before the jury and viewed by them. This considered together with the testimony of the witness, Short, is amply sufficient to constitute substantial evidence tending to prove the specific acts of negli-

gence set forth in the petition. [See Trout v. Laclede Gaslight Co., 151 Mo. App. 207, 222, 132, S. W. 58, s. c. 160 Mo. App. 604, 140 S. W. 1198.] However, in this connection, see, also, the recent ruling of the Supreme Court in the similar case of Hill v. Union Electric Light etc. Co., 260 Mo. 43, 169 S. W. 345. The court did not err in refusing to direct a verdict for defendant.

The principal instruction given by the court at plaintiff's request is as follows:

"The court instructs the jury that if you believe from the evidence that Louis May, plaintiffs' son, was killed as a direct result of receiving into his person an electric shock from defendant's, the city of Hannibal, wire or wires with which he came in contact, then the fact that he received from such wire or wires such electric shock is conclusive proof of the defect of the insulation on such wire or wires, unless you find and believe from the evidence that the insulation on said wire or wires was as safe as same could be made by all means which were reasonably accessible, and that the utmost care had been used to keep them so insulated, and that while said insulation was in such safe condition, if you find it was in such safe condition, the spur which Louis May had attached to his foot came in contact with said insulation and punctured it, through no fault of said defendant, the city of Hannibal, or through no defect in such insulation."

It is argued this instruction is erroneous in two respects: First, because it informs the jury that the fact decedent came to his death through receiving a shock from the wire is to be taken as conclusive proof of defective insulation, and, second, because it permits a recovery for plaintiff without heed whatever to the specific negligence charged in the petition. If the petition contained nothing more than a general averment of negligence and thus rendered the doctrine of *res ipsa loquitur* available to plaintiff. it may be the in-

struction could be approved, in that what appears to be the direction with respect to conclusive proof is much modified by the succeeding sentences. But the doctrine of *res ipsa loquitur* and the presumption which it affords is not available in the case, though otherwise appropriate, as it appears, for the reason that plaintiff saw fit to set forth the specific facts of negligence to the effect that defendant was remiss in its duty in permitting the insulation on its electric wire to become worn and rotten. Although a petition contains a general averment of negligence, this is superseded when specific acts of negligence are charged as well. [McManamee v. Missouri Pac. Ry. Co., 135 Mo. 440, 37 S. W. 119; Waldhier v. Hannibal & St. J. R. Co., 71 Mo. 514]. Then, too, when specific acts of negligence are charged in the petition it is essential that the instructions submitting the issue to the jury shall require a finding of the facts of negligence so charged. [Chitty v. St. Louis, I. M. & S. R. Co., 148 Mo. 64, 49 S. W. 868; Beave v. St. Louis Transit Co., 212 Mo. 331, 111 S. W. 52; Allen v. St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1142; Crone v. St. Louis Oil Co., 176 Mo. App. 344, 158 S. W. 417.]

In this view, it is the established rule of decision that where the petition charges specific acts of negligence, even though the case be one where under a general averment the doctrine *res ipsa loquitur* obtains, the instructions must require the jury to find the negligence as laid in the petition, and it is error to invoke the presumption of negligence therein, for it is said the plaintiff having asserted the facts concerning the negligence laid must be held to prove them. [Orcutt v. Century Bldg. Co., 201 Mo. 424, 99 S. W. 1062; Beave v. St. Louis Transit Co., 212 Mo. 331, 111 S. W. 52; Gibler v. Quincy, O. & K. C. R. Co., 148 Mo. App. 475, 128 S. W. 791; Miller v. United Rys. Co., 155 Mo. App. 528, 134 S. W. 1045.] The instruction above set out in nowise requires the jury to find the facts of

negligence charged in the petition and relied upon for recovery, and, moreover, it appears to be violative of the further rule of decision last cited in invoking a presumption or conclusion of negligence where such course is forbidden because of the facts alleged. The instruction is prejudicial because, under the petition, the negligence must be found from the evidence as a fact in the case—that is, whether decedent received the shock because of the worn and rotten condition of the insulation as plaintiff asserts, or whether the insulation was sufficient and he came to his death because of pressing the sharp steel spur attached to his boot upon it and against the cross-arm of the pole, as defendant asserts.

The judgment should, therefore, be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

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JOSIAH WHITESIDES, Administrator, Respondent,  
v. CHICAGO, BURLINGTON AND QUINCY  
RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, January 5, 1915.

1. **RAILROADS: Failure to Give Statutory Signals: Persons Entitled to Invoke.** Certain considerations indicate that a person walking along a railroad track is not, if injured, by being struck by a train, entitled to invoke the failure to sound the bell or blow the whistle on the locomotive eighty rods from a road crossing, conformably to Sec. 3140, R. S. 1909, as a ground of recovery, but that such failure inures only in favor of persons using the crossing in connection with the use of the highway.
2. ———: ———: **Contributory Negligence.** Sec. 3140, R. S. 1909, enjoining the duty of sounding the bell or blowing the whistle on a locomotive eighty rods from a road crossing, supplies the causal connection between a failure to perform such duty and an injury to a person at the crossing; but contributory negligence on the part of the person injured will defeat a recovery.

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Whitesides v. Railroad.

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3. ———: **Injury of Pedestrian: Failure to Give Statutory Signals: Contributory Negligence.** In an action for the death of a person walking along a railroad track, after dark, caused by his being struck by a train at a road crossing, where it was shown that decedent, a young man, possessed of all his faculties, knew that the train was due to pass the point of the accident about the time the accident occurred, and that the train made such noise that a person who was six hundred feet away heard it, and that decedent could have seen the train when it was half a mile away, *held* that decedent was guilty of contributory negligence as a matter of law, barring a recovery for his death on the theory that the statutory signals were not given as required by Sec. 3140, R. S. 1909.
4. **NEGLIGENCE: Last Chance Doctrine: Rationale.** The last chance doctrine proceeds upon the theory that the negligence of the person injured, in creating the situation of peril, was remote in the chain of causation, and the omission of the defendant to thereafter prevent injury to such person was the proximate cause of the injury, where it appears that the situation of peril was discovered or was discoverable by the defendant by exercising the requisite degree of care, in time to have enabled him to avert the injury.
5. **RAILROADS: Injury to Pedestrian: Last Chance Doctrine.** In order that a recovery may be had, under the last chance doctrine, for the death of a pedestrian by being struck by a train at a railroad crossing, it must be shown that decedent was on the track or in a position of peril when struck, and that the engineer could have seen him there, by the exercise of ordinary care, at such a distance as to have enabled him to avert the injury by prompt action with the means at hand for that purpose, with safety to persons on the train.
6. **EVIDENCE: Inference from Inference.** Although reasonable inferences may be drawn from facts in evidence and utilized in support of the verdict, other and additional inferences and presumptions of fact based alone upon, or afforded by, prior inferences cannot be utilized as evidence.
7. **NEGLIGENCE: How Established: Evidence.** Negligence is a positive wrong which must be established by facts and circumstances, including inferences, but cannot be presumed.
8. **RAILROADS: Injury to Pedestrian: Evidence: Inferences.** The facts that a blood spot was found on the railroad track at a highway crossing, that the skull of the deceased person was crushed, his shoulder "caved in" and his hip injured, were sufficient to warrant an inference that he was struck by a train; and the fact that the body was found to the north of the  
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blood spot warranted an inference that such train was northbound, and decedent having been seen walking along the track a short while before a certain northbound train passed, an inference that such train caused his death was legitimate.

9. ———: ———: **Last Chance Doctrine: Sufficiency of Evidence.** In an action for the death of a person walking along a railroad track after dark, caused by his being struck by a train, evidence *held* insufficient to justify a finding that decedent was in a position of peril for a sufficient length of time to have enabled the engineer, by the exercise of due care, to discover him and prevent the accident by the use of the instrumentalities at hand for that purpose; the inferences relied upon by plaintiff to establish such facts resting, not upon facts, but upon other inferences, which is not allowable.

Appeal from Montgomery Circuit Court.—*Hon. James D. Barnett*, Judge.

REVERSED.

*O. M. Spencer, Ball & Ball, Palmer Trimble and M. G. Roberts* for appellant.

(1) Defendant's demurrers should have been sustained because there is a positive absence of any proof whatever showing the circumstances attending the accident. Proof that Whitesides, returning from a sojourn to a saloon and carrying two baskets of beer, was seen at Dyer's private crossing some time between 10 and 11 o'clock at night walking north along and on a straight railroad track, that on the next day at another crossing 800 feet further north his body was found by the side of the track with his skull crushed and his watch stationary at 10:59, and that one of defendant's fast passenger trains passed over that track shortly after 11 p. m., may be sufficient to warrant an inference that he was killed by a train, but does not justify or warrant a finding that the engineer's negligence under the last chance doctrine caused his death. *Hamilton v. Railroad*, 250 Mo. 722; *Veatch v. Railroad*, 145 Mo. App. 239; *Davis v. Railroad*, 155 Mo.

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App. 314. (2) Mere concurrence of negligence and injury does not make the defendant liable. The duty to show by proof the direct connection of the alleged negligent act and the death is not affected by the humanitarian doctrine. Under that rule the plaintiff must show that the person killed could have been saved if defendant exercised ordinary care. While it may be proven by facts and circumstances, yet it cannot be proven by surmises, guesses, possibilities or by a process of reasoning whereby inference is built upon inference and conclusion upon conclusion. *Koegel v. Railroad*, 181 Mo. 379; *Cahill v. Railroad*, 205 Mo. 393; *Ginocchio v. Railroad*, 155 Mo. App. 163; *Glick v. Railroad*, 57 Mo. App. 104. (3) Statutory public crossing signals are intended to be given and are only required for persons approaching the track along the highway and not to persons reaching the crossing by walking along the right of way. *Burger v. Railroad*, 112 Mo. 246; *Degonia v. Railroad*, 242 Mo. 592, 593, 594; *Bell v. Railroad*, 72 Mo. 58; *Melton v. Railroad*, — Mo. —; *Evans v. Railroad*, 62 Mo. 58. (4) George Whiteside's own negligence was so apparent, as a matter of law, that a recovery for failing to sound the whistle for the public crossing would not have been permitted, and the case was submitted on the last chance theory, of which the statutory crossing whistle is no part or element. Whiteside was informed by plaintiff's main witness that number 15 would soon pass, and with such knowledge the decedent proceeded to his mysterious death. It is not negligence to fail to give public crossing signals to those who know the train is approaching, as the sole purpose of giving such statutory signals is to furnish such knowledge. The law does not require statutory crossing signals to be given to trespassers, and Whiteside, while using defendant's right of way for his own convenience and reaching a public crossing as an incident to his progress along the right of way, was still a trespasser though killed at the

crossing. *Railroad v. McKnight*, 166 Ill. App. 596; *O'Donnell v. Railroad*, 6 R. I. 211; *Randall v. Railroad*, 109 U. S. 478.

*S. S. Nowlin, Barclay, Fauntleroy & Cullen and Avery, Young, Dudley & Killam* for respondent.

NORTONI, J.—This is a suit under the wrongful death statute for damages accrued through the alleged negligence of defendant. Plaintiff recovered and defendant prosecutes the appeal.

Plaintiff's decedent, George Whitesides, was run upon and killed on defendant's railroad track by its locomotive and train, on the night of August 15, 1910, at a point in Lincoln county, about 2287 feet north of Oasis station. At the time of his death, Whitesides was an unmarried man, strong, robust, possessed of all of his faculties, and aged twenty-nine years. Thereafter Josiah Whitesides, his father, was duly appointed administrator of his estate by the probate court of Lincoln county, and prosecutes this suit as such under the statute. Although there is no evidence tending to prove that decedent was using the highway before the collision, it appears he was run upon by the engine while on the public crossing on the railroad; but evidently he came there after walking up the track between the rails—at least, all of the circumstances tend to so show the fact to be. He was run upon, it is believed, somewhere about eleven o'clock at night by defendant's northbound fast passenger train, number 15, after having been last seen shortly before walking on the track to the northward, at a point about 635 feet farther south.

There is no direct evidence tending to prove the fact of collision, but it is to be inferred from a considerable blood spot on the railroad track, about the middle of the public road crossing, and the further fact that decedent's body was found the following

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morning on the right of way west of the railroad and north of the road crossing, with his head crushed, one shoulder "caved in" and bruises on the hip.

It is argued the court should have directed a verdict for defendant because there is no evidence tending to prove the locomotive engineer was remiss in his duty in failing to observe decedent on the track in a position of peril in time to have averted the injury. On the other hand, it is urged that it was the duty of defendant to be on the lookout at the place for persons on the track, and that the engineer might have seen Whitesides walking northward between the rails for a sufficient distance to have enabled him to stop the train and avert a collision; also that defendant was remiss in its duty in failing to sound the statutory signal for the public road crossing where decedent was run upon. In the last analysis, the argument must be determined through reference to such legitimate inferences as are afforded by the meager facts in evidence, for the direct proof touching the real substance of the controversy—and that is relating to the position and conduct of the decedent, including the ability of the engineer to see and act in the premises for a moment or two before the collision—is slight, indeed.

It appears decedent lived with his father on a farm near to, but west of, the crossing of the public highway where he was run upon, and that he was entirely familiar with the railroad and the regular trains thereon. On the evening in question, he had made a trip to Old Monroe and returned to Oasis on defendant's train, number 7, about 10:15 o'clock at night, when he disembarked therefrom at the little station. The community is a rural one in the Mississippi river bottoms and adjacent to the neighboring bluff lands, about fifty miles north of St. Louis. Oasis station, maintained there by defendant, is a mere shelter for passengers, at which some of defendant's trains stop on signal for the accommodation of

the people of the neighborhood and also the patrons of several hunting and fishing clubs nearby. Number 7, the train on which decedent returned from Old Monroe, stopped at Oasis to permit him to alight therefrom, but number 15, the train which it is believed ran upon him, was a heavy passenger train which made no such stops—that is, it was a through train and not scheduled to stop at that station. There was no town or settlement immediately around the station, and the only approach thereto was by means of a private roadway running eastward over an embankment constructed through “Jake’s pond” to a public highway farther east, running north and south and parallel with the railroad track. In this vicinity, the railroad was constructed along the Mississippi river bottoms by skirting the bluffs on the west. 2287 feet north of Oasis station, a public highway running east and west crossed the railroad, and it was on the crossing of this that decedent was run upon.

The railroad track was inclosed by a fence on either side, and the station house more or less inaccessible except from the east, from whence it is reached by means of the private road connecting with the public road running north and south, above referred to. The evidence tends to prove that, because of these facts, the people of the neighborhood had, ever since the station was established, used the railroad track for a distance of 2287 feet between Oasis station and the crossing of the east and west public road to the north as a passway to and from the station, and this was done with the forbearance and consent of defendant. This user of the tracks by the public, it appears, too, attended the situation in connection with the arrival of train number 7 about ten o’clock at night, for it appears persons returning home on that train, as decedent did, were wont to walk north, as he did, up the tracks to the public road crossing, although, of course, some of them left the station by means of the

private road to the eastward, before described. Train number 7 was due at Oasis at 9:51, but, on the night in question, it was late, and it appears decedent was permitted to alight therefrom at the station about 10:15. Number 15—that is, the through passenger train from St. Louis north—was due at the same station at 10:44 p. m., but, as before said, it was not scheduled to, and did not, stop there. However, this train, too, was late that night and appears to have passed Oasis at about 11:00.

On the arrival of train number 7, on which decedent returned from Old Monroe, he was met at Oasis station by one Ed Ferris, a colored work-hand in the employ of his father. Though Ferris worked on the farm of the elder Whitesides, it appears he resided at another place near by. Ferris says he had requested George Whitesides, decedent, to procure for him a quart of whiskey at Old Monroe and had awaited the coming of the train at the Oasis station in order to receive it. It appears that Ferris had received an injury to his foot that afternoon—that is, he had either sprained or broken it, as he says—and it was in such a condition as to be both painful and almost useless for the while. When decedent alighted from the train he carried two baskets, and it is said these were laden with bottles of beer to be used as a treat for the threshers. Ed Ferris met him at the station and the two sat down and talked for a considerable while. The time is not definitely stated, but Ferris insists that neither took a drink of the whiskey or the beer, and the evidence is, that decedent was not addicted to drink in the least. Indeed, the witnesses say he was a sober, industrious young man and all disclaim knowledge of his having taken a drink of intoxicating liquors in several years. While Ferris and decedent tarried at the station, it is said Ferris was nursing his swollen foot, until they finally started homeward up the track. Ferris walked with two sticks and decedent carried the

two baskets on his arm. The progress was slow, as Ferris said they "mosied" along; he, though using two sticks, would frequently stop in order to rest or nurse his aching foot and decedent would wait and attend him—that is, help him along. The two traveled north on the track as far as Dyer's private crossing, which is about 1500 feet north of Oasis depot and 785 feet south of the public road crossing farther north. Here they separated, for Ferris desired to go to his brother's house to stay over night, while decedent intended to go to the public road crossing 2287 feet north of the station and 785 feet north of where they then were, and thence west about a quarter of a mile to his father's home, where he resided. Shortly before parting, something was said between the two men concerning number 15, as if they thought it should pass ere long. On reaching Dyer's crossing, Ferris says decedent accompanied him to, and opened, the gate in the right of way fence on the west, so Ferris could pass through, en route to his brother's residence, whereupon decedent returned to the track and started north walking between the rails. Ferris says he "hobbled" slowly along in Dyer's orchard adjacent to the railroad for about ninety feet, when he stopped to rest his foot, looked toward the railroad and saw decedent going north on the track about "one telephone pole"—that is, about 150 feet—to the north of the point where he had left him. This appears to be the last time that decedent was seen alive, for those on the locomotive say they did not see him at all. At the time, decedent was about 635 feet south and walking on the track toward the road crossing, where he was afterward run upon. Ferris "crippled" on slowly through the orchard, and when he reached a point about 200 feet from the right of way gate, he both heard and saw defendant's train, number 15, approaching from the south, about 600 feet away. He says the train was running very fast and neither the whistle nor bell on

the locomotive was sounded at all. The track at the place in question was practically straight and the view open for almost a half mile south of the road crossing. The night was clear and Ferris says "moonshiny" and the locomotive was equipped with a headlight supplied with acetylene gas.

On the following morning, the body of decedent was found on the railroad right of way, lodged against the cattle-guard fence west of the tracks and north of the public road, as before stated, with evidences of collision about it, in that the skull was crushed, one shoulder "caved in," and one hip bruised. Moreover, a considerable blood spot was found on the railroad track near the west rail but about the center of the crossing of the public road.

It is argued that plaintiff made a prima-facie case for the jury through showing that decedent was run upon at a public road crossing because of the failure of defendant to sound the whistle or ring the bell attached to the locomotive—that is, give the statutory signal eighty rods before reaching the crossing—for it is said such conduct is negligence *per se*. Besides the considerations which point the statutory obligation to give signals on approaching the crossing of a public highway as one inuring only in favor of those persons using the crossing in connection with the use of the highway, it is to be said that plaintiff's right, in so far as this argument is concerned, is to be denied on the grounds of contributory negligence. Although through the omission of the signals required the statute supplies the causal connection between the injury and the remission of duty, the contributory negligence of the injured party may defeat the right of recovery if such appears. [See *McGee v. Wabash R. Co.*, 214 Mo. 530, 544, 545, 114 S. W. 33; *Maginnis v. Mo. Pac. R. Co.*, 182 Mo. App. 694, 165 S. W. 849.] Here decedent was a young man, possessed of all of his faculties, and entirely familiar with the situation as well as the



fact that number 15 was about due to pass that point. Whether the signals were given or not, the approaching train emitted noises which were heard by Ed Ferris 600 feet away. The view of the train was open and clear for a half mile south of the crossing, and, in any view of the case, decedent must be regarded as negligent in being upon the crossing immediately in front of a passing train in the circumstances disclosed by the record. It is believed the counsel fully recognized this to be true, for they seem to have abandoned that theory of the case on the trial and requested the court to submit it to the jury on the last clear chance doctrine alone.

But it is argued, though the judgment may not be sustained on the theory involved in the failure to give the statutory signal when approaching the crossing, there is enough in the evidence to support a recovery under the last clear chance rule. The last clear chance doctrine proceeds on the hypothesis that the injured party himself was negligently, or, it may be otherwise, as through misfortune, in a position of peril and that such peril was either discovered or discoverable by the defendant in exercising due care, in time to have averted the injury through utilizing the appliances at hand to do so. The rule is utilitarian in character, in that it proceeds according to the precepts of humanity to make for the safety of others in enjoining diligence on the part of one who may, by exercising care, avoid a hurt to another through the prompt employment of the appliances at hand and in the circumstances of the particular case. It therefore reckons with the negligent or other unfortunate situation of the party in peril as remote in the chain of causation and treats with the duty and its breach on the part of the person in charge of the dangerous instrumentality as the proximate cause of the injury, in those cases where it sufficiently appears the position of peril was ascertained or ascertainable through due care on the part of those

who ran upon him, in time to have prevented the injury through utilizing the means at command for that purpose in such a manner as not to injure others.

This being true, it must appear, not only that decedent was upon the track in a position of peril for a sufficient length of time when run upon, but that he was observable there by the engineer, while exercising due care to that end, for a sufficient length of time and at such distance to have enabled him to avert the injury through prompt action with the means at hand for that purpose and at the same time allowing for the safety of those on the train. Moreover, this much must appear from the facts and circumstances in evidence or the legitimate inferences therefrom, and this, too, without piling inference on inference, for such may not be allowed. In other words, though reasonable inferences may be drawn from facts in evidence and utilized in support of the verdict, other and additional inferences and presumptions of fact based alone upon, or afforded by, prior inferences may not be utilized as evidence, for such inferences are illegitimate. [See *Hamilton v. Kansas City Southern R. Co.*, 250 Mo. 714, 157 S. W. 622.] Negligence is a positive wrong which must be established by facts and circumstances including inferences, but may not be presumed. [Witting v. *St. Louis & S. F. R. Co.*, 101 Mo. 631-640, 14 S. W. 743.] No one saw decedent on the railroad track at the time he was run upon, but he was seen by Ed Ferris 635 feet south of the crossing, walking in the middle of the track northward toward the place where he met his death. This fact, when considered in connection with the further fact that a considerable blood spot was on the track in the center of the public road crossing, affords ample evidence, but through inference only, that he was upon the track when run upon, also that he was then—at that instant—in a position of peril. The fact of the blood spot on the crossing and the fact that decedent's skull was crushed and shoulder

“caved in” and an injury appeared on his hip are ample evidence, but through the inference they afford only, that he came to his death as a result of a collision with defendant’s train. The fact that the body was thrown to the north and west of the blood spot on the track on the crossing is evidence, too, but only through inference thus afforded, that the train which ran upon him was northbound. From this it may be properly inferred that defendant’s train, number 15, occasioned his death.

But after allowing these inferences and considering, too, that decedent was seen on the track “one telephone pole” north of Dyer’s crossing not more than five or eight minutes before, can it be legitimately inferred that defendant’s locomotive engineer could, by exercising due care, have seen him in a position of peril in time to have stopped the train and averted the injury from which he died? In this connection, the evidence is to be regarded as sufficient to establish a user of the track with a license on the part of defendant sufficient to affix the obligation on the part of its engineer to look out for pedestrians walking there. The engineer says he did not see a man on the track at all and had no knowledge of a collision until he was told about it afterward; but be this as it may, the case is to be viewed as though he could have seen decedent immediately before the collision by exercising care to that end. But when and where the engineer should have seen the decedent is another question and one concerning which we are not enlightened by the record. Defendant is presumed to have exercised due care unless the contrary is made to appear. Plaintiff introduced no proof tending to show either how far a man might have been seen by the engineer at the time or in what distance the train could have been stopped. The only evidence concerning these questions in the record is that given by defendant, to the effect that the train could have been stopped in not

less than 1200 to 1400 feet, and that a man on the track could have been seen by the engineer not to exceed 242 feet distant. It is obvious, therefore, the matter is to be ascertained from inference alone. It may be the jury could infer this train could have been stopped in a much shorter distance than that mentioned by the engineer and it may be that they could have inferred the engineer could see a man on the track quite beyond the distance he stated. But the subject-matter under consideration here pertains to the very gravamen of the charge of negligence laid and, as before said, defendant enjoys the benefit of the presumption afforded by the law to the effect that it exercised due care until the contrary is made to appear. The precise inference called for relates to the *position, or rather the place, of the man (that is, decedent) on the track in the instant case*, together with the ability of the engineer to see him there, for such is essential to the fact of negligence. The inferences that a man could have been seen on the track and the train stopped in time to have saved him arise, not from the established fact that decedent was on the track at any *given place*, but rather rest upon the inference that he was. The decedent was found to be upon the track through utilizing inferences from facts given in evidence and so being upon the track, through inference alone, another inference may not be rested thereon to the effect that he was there at some particular place and in view of the approaching engineer for a sufficient length of time to enable him to avert the injury by the use of the appliances at hand. Touching this matter, the legitimate evidence seems to be insufficient under the recent ruling of the Supreme Court in a similar case. [See *Hamilton v. Kansas City, etc. R. Co.*, 250 Mo. 714, 157 S. W. 622.]

The judgment should be reversed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

NANCY E. OLIVER, Appellant, v. J. M. EPPERSON  
et al., Respondents.

St. Louis Court of Appeals. Argued and Submitted December 7,  
1914. Opinion Filed January 5, 1915.

1. **HUSBAND AND WIFE: Occupancy of Real Estate: Liability of Wife for Rent.** Where the use of certain real estate was bequeathed to a married woman, by the will of her father, for one year after his death, together with a proportionate part of the proceeds of a sale then to be made by the executor, and she and her husband held over for a further period during litigation, in which she unsuccessfully attempted to enforce a claim to the fee title to the land, she, and not her husband, was liable for the use and occupation, which claim was properly allowed as a set-off against her share of the proceeds.
2. **PARTIES: Misjoinder: Waiver.** Where plaintiff elected to sue the executor of her father's will for her share of the proceeds of land sold by the executor, who was not a distributee, and the distributees were made parties defendant and they and the executor set up an offset for the reasonable value of the land while it was occupied by plaintiff before the sale, plaintiff was in no position to thereafter object to the administrator as a party defendant.
3. **APPELLATE PRACTICE: Review: Matters not Embodied in Record.** Whether a bond given in prior litigation was a supersedeas or only a bond for costs, could not be determined, on a subsequent appeal, where the bond was not preserved in the record presented on such subsequent appeal.

Appeal from Knox Circuit Court.—*Hon. Charles D. Stewart*, Judge.

**AFFIRMED.**

*O. D. Jones* for appellant.

*L. F. Cottey* for respondents.

REYNOLDS, P. J.—Plaintiff below, appellant here, brought her action against the defendant Epper-

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son, one of the respondents, setting up in her petition that that defendant is indebted to her in the sum of \$520, with interest at six per cent from January 1, 1912, for which and costs she demands judgment. On what this claimed indebtedness accrued is not stated. On motion of defendant, other parties, heirs and devisees of one C. M. Coe, were joined as defendants, and Epperson and these other parties answered, setting up that Epperson is the duly qualified and acting executor of Coe, who died testate November 8, 1907; that plaintiff is the daughter of C. M. Coe, and by the terms of his will entitled to the use and control of certain real estate of the deceased for one year next after his death, the real estate consisting of about seventy-one acres, with dwelling house, barn, etc., in Knox county; that the will provided that this real estate should be sold by Epperson as executor for cash and the proceeds divided equally between the children and grandchildren of the deceased, naming them, there being seven including plaintiff, these seven constituting the distributees; that on April 29, 1908, while plaintiff was in possession of this land under the will, she brought a suit in equity in the circuit court of Knox county against the other children and grandchildren of the deceased, who are the defendants herein, as well as against the defendant Epperson, as executor of the will of C. M. Coe, claiming in her bill to be the owner in fee of all of said land by virtue of a verbal contract made with her father C. M. Coe in his lifetime, and praying that the title to the land be quieted as against the defendants and vested in plaintiff and that it be adjudged and decreed that she is the owner of the land in fee simple; that on the trial of this suit at the June term, 1908, of the circuit court of Knox county, it was adjudged that the plaintiff's bill be dismissed, defendants being awarded a judgment for costs; that from this judgment plaintiff at that term of court perfected her appeal to the Supreme Court,

giving an appeal bond in the sum of \$600, which it is averred in the answer operated as a *supersedeas* to stay proceedings pending the appeal to the Supreme Court, and that afterwards on December 19, 1911, the judgment of the circuit court was affirmed by the Supreme Court. There is the further charge that by virtue of this suit in equity and the appeal with the *supersedeas* as aforesaid, plaintiff was enabled to and did remain in possession of the land from the date of the death of her father C. M. Coe, which occurred on November 8, 1907, until March 1, 1912, this, it being averred, being a period of more than three years longer than plaintiff was entitled to the use and occupation of the land under the will of her father; that during this period of three years immediately prior to March 1, 1912, plaintiff was wrongfully in possession, use and occupancy of the land and used and farmed the same for her own use and benefit, and that the reasonable value of this use was at the rate of \$200 a year, or \$600 for the three years.

It is further averred that the defendant Epperson, acting in his capacity as executor of the will of C. M. Coe sold the land for \$3600, but because plaintiff was in the sole control and possession of the land pending her appeal to the Supreme Court, he was unable to consummate the sale or collect any of the purchase price except the sum of \$100, which was paid at the time of the contract for the sale, until March 1, 1912, on which latter date plaintiff surrendered possession of the land and the defendant Epperson received the balance of the purchase price, namely, \$3500; that after paying the commissions, attorney's fees and other costs made necessary by the suit in equity which plaintiff had instituted, there were left for distribution in the hands of Epperson not to exceed some \$3000, of which plaintiff's distributive share would be \$428.57, which distributive share, it is averred, plaintiff would be entitled to upon the payment of the rents which she owes

for the use and occupation of the land; that being, as before stated, \$600; that all of the defendants, except Epperson, are distributees under the will and entitled respectively as such distributees to the rental value of the land for the time it was used and occupied wrongfully by plaintiff in the sum of \$600, which they plead as a counterclaim to the cause of action alleged in plaintiff's petition. Averring that there was no merit in plaintiff's suit; that she is insolvent and that it would be unjust and unfair to the other distributees named in the will to allow plaintiff to keep the rents and profits of the land for three years, amounting to \$600, and at the same time share equally with the other distributees in the proceeds of the sale, and averring that plaintiff has refused to repay or adjust in any manner her indebtedness to defendants for the use and occupation of the farm, although frequently requested and urged to do so, judgment over is claimed for \$600 and costs.

Replying to this answer in so far as it concerns Epperson, plaintiff admits that Epperson was duly appointed and qualified and acting as executor of the will of C. M. Coe, deceased, but denies that he is now qualified and acting under the will, averring that on November 16, 1911, he filed his final settlement, which was acted upon by the probate court and approved, but that Epperson was not finally discharged as executor by order of the court, "on account of the said estate being in litigation." It is further averred that the executor has not reported the sale of the land and is not in fact or in law acting as executor under the will; admits the allegation made by defendants as to the will of C. M. Coe, and that on April 28, 1908, she (plaintiff) brought her suit in equity in the circuit court of Knox county against all of these present defendants, claiming in her petition in that case to be the owner in fee of the tract of land before referred to by virtue of a contract made



between her and her father in his lifetime, and asking that title to the land be adjudged in her in fee and defendants adjudged to have no title therein; admits the fact of the decree going against her in that suit and her appeal from the judgment to the Supreme Court and avers that the bond therein given acted only as a *supersedeas* to stay collection of the costs in the cause; that neither she nor the defendants in that cause sued for or claimed any rents, nor did they demand that possession be adjudged to either party, she avers that the bond was not a *supersedeas* as to possession or rents during the three years of the litigation; admits, however, that the judgment of the lower court was affirmed by the Supreme Court and "that the plaintiff did remain in possession of said seventy-one acres of land until about March 1, 1912, and admits she was entitled to the use and occupancy thereof, according to the terms of the will, for the space of one year after the date of the death of her father." Denying every other allegation in the answer of the defendant Epperson, plaintiff avers that for the term of about three years, and while the above referred to litigation was pending, she (plaintiff) lived on the lands with her husband, he being her husband now and during all of the litigation and as such, in law, is the head of the family, and that he occupied and farmed the lands during that period and that if any rents are due to any of the defendants in the cause, they are due from her husband on his implied contract, "if any contract was made for the use and occupation of said land;" admits the sale of the land by defendant Epperson, as executor, for \$3600; charges that he sold it before the expiration of the year; that she, plaintiff, was entitled to the possession on February 28, 1908. Denies that her distributive share of the proceeds of the sale is only \$428.57; denies she is indebted to defendants or to the estate of her father for the rental value of the land for three years, or for any other term, in any

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sum, and avers that she claims her distributive share in the proceeds of the sale in the sum alleged in her petition and asks judgment as prayed in her petition, further averring that defendant Epperson is not the acting executor of the estate at this time, "and as such executor that he has no interest in the distributive share of this plaintiff, and that it is his duty as defendant in this cause to pay her (plaintiff), her distributive share and for which she asks judgment and costs."

The reply to the answer of the other defendants is practically the same as is the reply to the answer of Epperson, omitting the allegations as to him, but repeating in this reply that under the terms of the will of her father she was entitled to the use and control of the real estate for the term of one year next after the date of his decease, and that on April 28, 1908, she "was in possession of said lands and she did bring a suit in equity as alleged in the answer, claiming to be the owner in fee of said lands by virtue of contract with her said father," etc.

The cause was tried before the court substantially on an agreed statement of facts in which, among other things, it was agreed that the rental value of the seventy-one acres of land referred to was \$180 per annum, being \$540 "for the three years it was occupied by plaintiff, to-wit, from March 1, 1909, to March 1, 1912;" that plaintiff is and was a married woman, living with her husband at all the times mentioned in the pleadings and is still a married woman living with her husband. The will of C. M. Coe is set out in full and provides, among other things, that the plaintiff Nancy E. Oliver, "have sole use and control of all of my real estate for one year after my death, and at the end of that year all my real estate to be sold by the executor of this will without an order from the probate court, and the proceeds of the sale be divided equally among the following named persons," naming his liv-

ing sons and daughters and two grandsons and a granddaughter, the defendants here, and authorizing the executor named, that is the defendant Epperson, to sell the real estate at private sale, if in his judgment he should deem it to be to the interest of all concerned. By the statement it was further agreed that the executor did not complete the sale of the real estate or collect the purchase money until March 1, 1912, and that he did not report the sale to the probate court, but filed his final settlement. That court made an order approving it but further providing that "on account of the said estate being in litigation said executor is not discharged." The appraised value of the personal property bequeathed to plaintiff by her father in his will was set out and it was admitted that plaintiff had subsequently turned over to the executor \$123.24 to be applied on the funeral expenses of her father and for other costs, and that plaintiff had given the executor a receipt for the personal property, enumerating it and valuing it at \$848.30, plaintiff agreeing in this receipt, "In case of debts proven against estate and no personal property to pay them, I agree to refund all or so much of the personal of said estate as may be necessary to pay said debts and the costs of the administration of said personal estate, and not real estate." It was further agreed that plaintiff and her husband are insolvent and that plaintiff does not claim to be the owner of any property except the money in controversy in this suit.

Over the objection of plaintiff, defendants, on the trial, in addition to this stipulation, introduced in evidence the report of the sale of the real estate filed in the probate court June 17, 1912, and approved by the probate court of Knox county. This was all the evidence in the case.

At the conclusion of the trial plaintiff asked several declarations of law, the material ones being that on the pleadings and evidence the debt for rents is

the debt of the husband of plaintiff for use and occupation of the lands, and that the money sued for in the hands of defendant Epperson belongs to plaintiff, being the proceeds of land that constituted her separate estate which cannot be taken by defendant for the debt of her husband, unless it be to pay a debt contracted by him for necessities for plaintiff and her family, and that the answers interposed by defendants do not constitute any defense to plaintiff's right to recover in law or equity. These were refused, plaintiff excepting. Other points were covered by the declaration asked, but are not material to be here noticed, those noted being covered by the assignments of error.

The court found the issues joined in favor of plaintiff on her cause of action, but further found in favor of defendants on their counterclaim and set-off, allowing the sum of \$540, as the stipulated value of the rental of the real estate from March 1, 1909, to March 1, 1912. The court further found that plaintiff was a legatee under her father's will and would be entitled to her distributive share in the net proceeds of the sale of the land mentioned in the pleadings, if she was not indebted to the estate, but that as she owed the estate the sum of \$540 for rental for the three years mentioned, and as that is more than her distributive share and more than the sum claimed in her petition, and as plaintiff is insolvent and no judgment asked against her except for costs, "it is therefore considered and adjudged by the court that plaintiff take nothing by her suit herein; it is further considered and adjudged by the court, that the money sued for by plaintiff is the property of the defendants, other than the defendant Epperson and should be by said Epperson distributed to the other defendants upon his settlement of said estate." The costs were adjudged against the plaintiff and execution ordered. Interposing a motion for new trial and one in arrest, and excepting to the action of

the court in overruling these motions, plaintiff has duly perfected her appeal to this court.

Appellant assigns four errors: first, that the trial court erred in finding and holding that plaintiff was indebted to the estate for the use of the lands; second, that it erred in refusing to find that the claim of the estate, if any, was simply for use and occupation, on a contract implied by law against the husband; third, in refusing to find that the debt, if any, was one in the nature of necessities for the family, for which the husband alone is liable; and fourth, in finding that the rental belonged to the estate and to the defendants, and that it could be held and applied as an offset against plaintiff's distributive share in the estate.

It is said by learned counsel for appellant that "this case is part of the aftermath of the case of *Oliver v. Johnson*, 238 Mo. 359, 142 S. W. 274," and that the executor did not complete the sale of the land which he had contracted for until March 1, 1912, after the decision of that case, and that in the meantime "the plaintiff and her husband occupied the seventy-one acres in litigation without any contract with the executor or any one else," that they merely held over about three years longer than contemplated by the will.

In point of fact this claim that the husband and not the wife was the occupant of the land, is the gist of the foundation of the claim here set up by the appellant in resisting the demand of the defendants, and charging her, as against her distributive share in the estate of her father, with the rental value for use and occupation of this seventy-one acres of land. All the parties to this litigation have evidently tried it in the circuit court with the knowledge, not only on their part, but on that of the court, of the proceedings in that same court in *Oliver v. Johnson*, *supra*, and it will facilitate an understanding of all the facts in-

volved to consult the statement of facts and opinion of the Commissioner in that case.

It appears by the pleadings in the case at bar as well as by an examination of the amended petition, which it set out in *Oliver v. Johnson*, *supra*, that during all the time of the litigation in which the present plaintiff sought to have title vested in her to the seventy-one acres, that she claimed to be in possession of it as owner in fee under contract with her father. Even in the agreed statement of facts filed in this case it is set out that the rental value of the land "was \$180 per annum or \$540 for the three years it was occupied by plaintiff." The attempt now made to claim that this was the occupancy of the husband, is not consistent with the act or conduct of the plaintiff throughout this long litigation, and the trial court very properly found that this was a debt due from plaintiff to the estate or to the devisees. It is true that there was no express contract of rental or of landlord and tenant, but plaintiff occupying the land claimed it as her own. While it is agreed "that plaintiff is and was a married woman; living with her husband, N. S. Oliver, at all the times mentioned in the pleadings, and that she is still a married woman living with her said husband," there is not a word of testimony, either by the agreed statement or outside of it, that the possession was the possession of the husband, or that he, as owner, or tenant, or otherwise than as husband of plaintiff, occupied or farmed the lands, or did so in his own right. On the contrary, the presumption is that as the wife, claimed to be owner, the occupancy of the husband was in right of the wife—an occupancy in no manner inconsistent with his marital duty of providing her with a home. Having a home of her own in which the husband was content to also dwell, he was under no necessity to provide her another. There are many husbands in this State who are occupiers of the lands and tenements of the wife; but that occupancy does

not necessarily determine the question of who is to be held as tenant. Here the conclusion which must be drawn from the admitted facts is, that the occupancy by the husband was in right of his wife and not under any claim of his own. The wife claiming the premises as her own, is bound for the reasonable value of the use and occupation, notwithstanding the fact that her husband may have been bound to provide a home for her during the continuance of their marital life. According to all the facts in this case as shown by this record, the possession of the tract of land through the three years of the litigation was the possession of the plaintiff as in her own right, as she claimed, and she was the responsible party for the rental value of this property: as she owed the estate this, it was properly offset against her distributive share.

As no suggestion is made of the improper joinder of parties defendant, we do not pass on that proposition. Surely the plaintiff having elected to sue the administrator cannot object to him as a party defendant.

It is said in argument by counsel for appellant, that the bond given on the appeal in the case of *Oliver v. Johnson et al.*, supra, was not a *supersedeas* except as to costs. That point cannot be here determined, as the bond does not appear in the record. Ordinarily, however, a bond given in a case such as that referred to, acts as a *supersedeas* of the whole judgment from which the appeal is prosecuted.

We see no reason to disturb the finding of the learned trial court in this case and think that it should be affirmed. It is so ordered. *Nortoni and Allen, JJ.*, concur.

**J. W. MORAN, Appellant, v. WESTERN UNION  
TELEGRAPH COMPANY, Respondent.**

**St. Louis Court of Appeals. Submitted on Briefs December 9, 1914.  
Opinion Filed January 5, 1915.**

**TELEGRAPHS AND TELEPHONES: Failure to Deliver Message:**

**Penalty: Necessity of Prepayment.** Payment or tender of the usual charges for transmitting and delivering a telegram, at the time it is accepted, is a condition precedent to the right to recover the penalty provided for by Sec. 3330, R. S. 1909, for failure of the telegraph company to promptly transmit and deliver the telegram.

**Appeal from Montgomery Circuit Court.—*Hon. James D. Barnett, Judge.***

**AFFIRMED.**

*E. Rosenberger & Son* for appellant.

(1) It is the duty of a telegraph company which receives a message for transmission directed to an individual at one of its own stations to deliver that message to the person to whom it is addressed with reasonable diligence, and in good faith. That is a part of its contract implied by taking the message and receiving payment therefor. *Hughlett v. Western Union Telegraph Co.*, 172 Mo. App. 272. (2) Section 3330, R. S. 1909, providing for the infliction of a penalty on telegraph companies for failure to promptly deliver a telegram, etc., being a penal statute, is to be strictly construed, and its operation is not to be extended beyond its necessary meaning, but this does not mean that its life and spirit are to be construed out of it by a strict adherence to its words. *Elliott v. Western Union Telegraph Co.*, 175 Mo. App. 213. (3) The operator of a telegraph company is the agent of the company in receiving over a telephone a message to



be transmitted by the company in the absence of any showing that the company forbade such practice, or that if it was forbidden the sender had notice of such regulation. *Carland v. Western Union Telegraph Co.*, 76 N. W. 762. (4) Plaintiff is entitled to recover in this case. It clearly falls within the statute; the message was a prepaid message within the meaning of the law. *Western Union Telegraph Company v. Henley*, 60 N. E. 682.

*Geo. H. Fearons and G. Pitman Smith* for respondent.

(1) The message was not a prepaid message and was not paid for to Mr. Dickenhorst, manager, by Mr. Guinn, until some time later, and was not paid by Mr. Dickenhorst to the company until the first of the following month; and not being a prepaid message does not come within the provisions of section 3330, R. S. 1909, imposing a penalty for failure to promptly deliver a telegraphic message. *Brockman Commission Co. v. W. U. Tel. Co.*, 163 S. W. 920; *Naysep v. W. U. Tel. Co.*, 168 S. W. 259; *Adcox v. Telegraph Co.*, 171 Mo. App. 331; *Eddington v. Tel. Co.*, 115 Mo. App. 93; *Wood v. Tel. Co.*, 59 Mo. App. 236; *W. U. Tel. Co. v. Moosler*, 95 Ind. 29; *Langley v. Tel. Co.*, 88 Ga. 777; *W. U. Tel. Co. v. Ryalls*, 94 Ga. 336. (2) This statute is penal in its character and must be strictly construed; and plaintiff in order to recover must bring himself clearly within the terms and provisions thereof. Obviously, one who seeks to invoke the statute and recover such penalty must bring his case clearly within its terms. *Brockman Commission Co. v. W. U. Tel. Co.*, 163 S. W. 920; *Naysep v. W. U. Tel. Co.*, 168 S. W. 259; *Adcox v. Tel. Co.*, 171 Mo. App. 331; *McCloud v. Tel. Co.*, 170 Mo. App. 624; *Grant v. Tel. Co.*, 154 Mo. App. 279; *Bradshaw v. Tel. Co.*, 150 Mo. App. 711; *Cowan v. Tel. Co.*, 149 Mo. App. 407; *Eddington*

v. Tel. Co., 115 Mo. App. 93; Pollard v. Tel. Co., 114 Mo. App. 533.

REYNOLDS, P. J.—One J. W. Moran, plaintiff below, appellant here, living in the country, in Lincoln county, near Olney, sent his son to one Guinn, a merchant at Olney, who had a Bell telephone connection with Troy, in Lincoln county. The son desired to telephone a message to Montgomery City to one James Elder, but Guinn ascertained that the telephone line was not operating through to Montgomery and suggested that the message be telephoned to Troy and wired from there to Montgomery City. This was done and Guinn telephoned to the operator of the Western Union Telegraph Company at Troy, this message, directed to James Elder, Montgomery, Missouri: "Mother dead; funeral three o'clock. Telephone Dr. Mudd." (Signed.) "William Moran." At the same time Guinn, who had no official position with the Telegraph Company, told the telegraph operator at Troy, one Dickenhorst, that he wanted the message to go as a prepaid message. The telegraph operator at Troy accordingly transmitted it that day, that is to say, September 19, 1911, by the line of the Western Union Telegraph Company, to Montgomery City, and it appears that it was received at the telegraph office there at 8:42 a. m., on the 19th of September.

While this message was marked "Paid," there is no testimony that in point of fact anything was paid on it at the time the telegraph operator at Troy sent it forward. To the contrary, the telegraph operator testified that knowing Guinn, he trusted him to pay him for it, and this operator merely entered up a memorandum in his personal book of the fact that Guinn owed him twenty cents for this message, that being the usual and proper charge of the Telegraph Company for transmitting it from Troy to Montgomery City. It appears that the message was not delivered

to Elder on the 19th and he did not hear of it until the 20th; that it was on that day telephoned to his residence from the Montgomery office, but it did not actually come into his hands, or into the hands of any member of his family until the following day, that is the 21st, too late for Elder or his family to attend the funeral of the lady referred to in the telegram, who it appears was a relative. It is asserted by learned counsel for appellant in his abstract that Moran's son paid Guinn the twenty-five cents as well as telephone charges at the time of the delivery of the message to Guinn at Olney, but a careful examination of the testimony of Guinn, who it is claimed made this statement, and which testimony is set out in full by respondent, fails to sustain this assertion.

At the conclusion of the trial, which was before the court, a jury having been waived, the plaintiff asked various declarations of law, all on the theory that there had been a prepayment of the usual charges and that the Telegraph Company had not used proper diligence in the delivery of the message and hence was liable to the statutory penalty. After hearing the case and taking it under advisement to a succeeding term of the court, the learned trial judge, refusing all the declarations of law asked by plaintiff, found for defendant on the sole ground, as he stated, that there had been a failure to prove prepayment to the defendant Telegraph Company of the usual charges for the transmittal of the telegram.

The action here is under our statute (section 3330, Revised Statutes 1909) imposing a penalty of \$300 for every neglect or refusal to transmit and deliver a message duly filed with an agent of the Telegraph Company. It is distinctly provided in this section that telegraph companies become liable for the payment of the penalty imposed by the statute only "on payment or tender of their usual charges for transmitting and delivering dispatches as established by

the rules and regulations of such . . . telegraph lines, to transmit and deliver the same to designated address," etc.

That due diligence was not used in this case is evident; in point of fact, no excuse is offered for the delay. It appears that Mr. Elder's residence in Montgomery City was well known, as were also he and his family, but, as before stated, the learned trial judge put his conclusion solely upon the ground of a failure to prepay the usual charges.

On a careful consideration of the evidence in the case and of the authorities cited by the learned counsel for appellant, we think his conclusion is correct. It is very clear that the message was not prepaid but that the operator at Troy sent it forward on the credit he gave Guinn. In point of fact, Guinn did not pay the operator until some time afterwards.

In the light of the very careful consideration given to the proper construction of this section 3330 of our statute, by this court in *F. W. Brockman Commission Co. v. Western Union Telegraph Co.*, 180 Mo. App. 626, 163 S. W. 920, and in *Nasep v. Western Union Telegraph Co.*, 184 Mo. App. 141, 168 S. W. 259, it is not considered necessary to go into an elaborate discussion of the law applicable here. The writer does not feel that he can add anything of service to the public or the profession to what has been so ably said by his learned colleagues in those two cases.

It is distinctly ruled in the Brockman case that marking the word "Paid" on the message is without influence, when the "facts concerning the transaction affirmatively appear, showing that the charges were not actually prepaid in cash." In the Nasep case the agent of the sender paid the charges within a few hours after the delivering and forwarding of the message, but we held that did not meet the requirement of this statute. So it is here, and so the learned trial judge found. We see no reason to disturb the finding of the

trial court on the facts, and so finding he properly refused all the declarations of law asked by appellant.

On the authority of the two cases above cited, and on the facts here in evidence, the judgment of the circuit court is affirmed. *Nortoni* and *Allen, JJ.*, concur.

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EMIL STRAUDEL, Respondent, v. G. A. LUBELEY.  
Appellant.

St. Louis Court of Appeals. Submitted on Briefs December 10, 1914. Opinion Filed January 5, 1915.

1. **TRESPASS: Forcible Entry into Room: Remedy of Tenant.** An action, by one who had been in peaceable possession of a room rented to him by the tenant of the house, against an agent of the owner, for breaking into his room and removing his property therefrom, is an ordinary action for trespass, and hence the point made by defendant, that plaintiff's sole remedy was by an action for forcible entry and detainer in a justice's court, under Sec. 7656, R. S. 1909, was untenable.
2. ———: ———: **Punitive Damages.** Where an agent of the owner of a house, after unsuccessfully attempting to get a constable to do so, entered a room occupied by plaintiff, who had rented it from a former tenant of the entire house and was in peaceable possession of it, and removed plaintiff's property therefrom, it was proper to authorize the jury to assess punitive damages against him, if they found that he acted wantonly and maliciously.

Appeal from St. Louis County Circuit Court.—*Hon. John W. McElhinney*, Judge.

**AFFIRMED.**

*Richard F. Ralph* for appellant.

(1) *Trespass quare clausam fregit* is a form of action which lies to recover damages for injury to the realty, consequent upon entry without right upon the

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plaintiff's land. Bouvier's Law Dictionary, page 610. The common law affords no civil remedy against a person having a right, who enters forcibly but the injured party must appeal to the statutory action of forcible entry and detainer. *Levy v. McClintock*, 141 Mo. App. 593; *Fuhr v. Dean*, 26 Mo. 116; *Krevet v. Meyer*, 24 Mo. 107. The whole scope and theory of the law of forcible entry and detainer is to prevent men from attempting vindication of their rights with their own hands. *Craig v. Donnelly*, 28 Mo. App. 351. (2) Section 7883, R. S. 1909, relating to notice to tenants at will, etc., does not give a tenant holding over, a right to notice to quit. *Benfey v. Congdon*, 40 Mich. 283; *Allen v. Carpenter*, 15 Mich. 25; 2 *Tiffany, Landlord & Tenant*, page 1432; Vol. 1, (1910 Ed.), page 153.

*F. W. Brooks* for respondent.

Plaintiff was entitled under the statute, being a tenant at sufferance, to one month's notice of the landlord's intention to terminate his tenancy. A tenancy at will or by sufferance or for less than one year, may be terminated by the person entitled to the possession by giving one month's notice in writing to the person in possession requiring him to remove. All contracts or agreements for the leasing, renting or occupation of stores, shops, houses, tenements or other buildings in cities, towns or villages, not made in writing signed by the parties thereto or their agents, shall be held and taken to be tenancies from month to month, and all such tenancies may be terminated by either party thereto or his agent giving to the other party or his agent, one month's notice in writing of his intention to terminate such tenancy. Section 7883, R. S. 1909. A tenancy at sufferance can be terminated only after statutory notice. *Tarlotting v. Bokern*, 95 Mo. 541. In the case at bar under the evidence, the plaintiff was entitled to an instruction for punitive damages. *Wams-ganz v. Wolf*, 86 Mo. App. 205.

REYNOLDS, P. J.—Plaintiff, averring that he was in the peaceable, quiet and lawful possession of the premises described, to-wit, a room in a one-story four-room frame building on Meramec Station road, in St. Louis county, and that the defendant, without leave or authority of law, wilfully, maliciously, wrongfully and forcibly, broke into and entered the room in the house occupied by plaintiff and cast out and carried away out of the rooms of the house all of plaintiff's furniture, wearing apparel, goods, wares and merchandise alleged to be of the value of \$475, claims damages by this act for the value of the goods so removed in the sum of \$475, and \$500 exemplary or punitive damages.

The answer, after a general denial, sets up that the premises described were part and parcel of the estate of Timmerman, deceased; that under the provisions of his will, his trustee was given the care, custody and possession of the premises, and at the time mentioned in the petition this trustee was entitled to the lawful possession of the premises and the right of entry thereon; that defendant in this action was at the times mentioned the duly authorized and acting agent of the trustee in the care, control and custody of the premises and as such was entitled to lawful possession, control and custody of them and the right of entry thereon, and that plaintiff was not at any of the times mentioned either in the lawful possession or entitled to the same but was a trespasser.

There was a reply to this, denying the averments of the answer.

At a trial before the court and a jury, there was evidence tending to prove that one Behring had rented the house, of which this room was a part, from the trustee of the estate, the property belonging to the estate of one Timmerman, father of the trustee; that a son of the trustee was the agent of the grandfather and had authority from the grandfather to rent out these premises and collect the rent; that he had rented

them to Behring, who had sublet the rooms to different parties, among others subletting the room in controversy to the plaintiff, who moved into the room on the first of April, 1910, continuing to live there until the 28th of June, 1911. It seems that Behring had vacated and thrown up his tenancy, leaving plaintiff in possession of the room. Plaintiff was to pay Behring a monthly rental but it does not appear that he had paid much, if any, rent, nor, in point of fact, that rent had been demanded of him. Nor was there any evidence of a demand for possession of the room made upon plaintiff at any time by any one. The evidence further tends to prove that plaintiff, who worked out during the day and occupied the room at night, having his clothing and some furniture in it, returned from his work on the evening of the day of the alleged trespass and found the door locked. That was at night or late in the evening and plaintiff appears to have gone to some other place to sleep that night. Returning the next day to the premises, he found the door of the house locked, and looking through a window he found that all of his property had been taken out of the room. He subsequently found that a part of it had been placed on the lot outside of the building and upon examining it, found that various articles which he testified had been in the room, such as wearing apparel, his naturalization certificate, and other property had disappeared. It was in evidence that defendant, in person and with the assistance of another acting under his direction, had gone to the house during the absence of plaintiff, found a key that unlocked the door, entered and removed all of plaintiff's effects from the room and from the building and placed them outside of the house on the lot. Plaintiff did not remove any of his furniture or possessions from where they had been left by defendant.



There was no probative evidence as to the value of the articles removed, destroyed or lost.

At the conclusion of plaintiff's evidence defendant asked for an instruction to the effect that plaintiff could not recover. This was refused, defendant excepting, and then introducing his evidence.

At the request of plaintiff the court instructed the jury that if they believed and found from the evidence that the room mentioned was part of the building belonging to Timmerman, or to his estate, and that it was leased by Timmerman to Behring, and that Behring had leased or rented the room to plaintiff and put plaintiff in possession of said room about April 1, 1910, and that plaintiff had remained in occupancy thereof, residing therein and keeping his furniture and other personal property in the same, and that on June 28, 1911, he was peaceably and without disturbance so occupying the same and that while he was in such occupancy the defendant, with another assisting him, without the consent and against the will of plaintiff, entered the room and removed the furniture and other personal property belonging to plaintiff from the same, the jury would find in favor of plaintiff and assess the actual damages at a nominal sum, that is one dollar or one cent.

The court further instructed the jury of its own motion, modifying instructions requested by plaintiff, that if the jury found in favor of plaintiff and found from the evidence that the defendant wantonly and maliciously broke into and entered the room and removed plaintiff's goods, etc., from the room, then the jury may, if they think proper, in addition to the actual damages found by them, assess exemplary damages in favor of plaintiff by way of punishment and as a warning to others, in such sum as the jury may deem proper under all the circumstances of the case, and that although in such case the jury may find and allow punitive damages, if they think proper, this is a matter

left to their discretion and they are not bound to allow such damages but may do so or not as they may deem just and proper under all the circumstances of the case, as shown by the evidence.

The court also properly defined 'malicious' as used in this instruction.

Excepting to the giving of these instructions defendant asked an instruction that under the pleadings, the law and the evidence the jury could not find exemplary damages for plaintiff against defendant. The court refused this, defendant excepting.

The verdict awarded plaintiff one dollar as actual damages and \$200 as exemplary or punitive damages.

Interposing a motion for new trial and excepting to that being overruled, defendant has duly perfected his appeal to this court.

It is argued by the learned counsel for appellant that this is an action *trespass quare clausam fregit* to recover damages for injury to the realty consequent upon entry without right upon plaintiff's land; that the common law affords no civil remedy against a person having a right who enters forcibly; that the injured party must appeal to the statutory action of forcible entry and detainer; that the whole scope and theory of the law of forcible entry and detainer is to prevent men from attempting vindication of their rights with their own hands. Quoting section 7656, Revised Statutes 1909, it is argued that the whole subject-matter of forcible entries has been revised by the enactment of the forcible and unlawful entry and detainer acts: that common law and statutes may be repealed by revision of the whole subject-matter of the former law which is evidently intended as a substitute for it, and that section 7883, Revised Statutes 1909, relating to notice to tenants does not give a tenant holding over a right to notice to quit. In brief, the contention is that plaintiff has missed not only his form of action, but the proper forum; that he should have commenced his ac-

tion under section 7656, Revised Statutes 1909, before a justice of the peace, and that the remedy there given is exclusive of any common-law remedy.

The principal authority relied upon by learned counsel for appellant, from our own State, is *Levy v. McClintock*, 141 Mo. 593, 125 S. W. 541, counsel claiming that the case there considered is on all fours with the case at bar. We cannot agree with counsel, and do not think that case applicable nor that it sustains his proposition. We think this an ordinary action for trespass and not an action for trespass to the realty. It is very similar in its facts to the facts in *Gildersleeve v. Overstolz*, 90 Mo. App. 518, and *Murphy v. Centruy Building Co.*, 90 Mo. App. 621. That may also be said, in a measure, and in the controlling features of it, of the case of *Seago v. Paul Jones Realty Co.*, 185 Mo. App. 292, 170 S. W. 372. The law announced in those cases, as well as the principle involved in them, may well be applied here.

On the facts in evidence in the case at bar, plaintiff was in the peaceable possession of the premises, and, as far as appears, lawfully in the possession of them. No point is made that the tenant had not authority to sublease to this plaintiff. Whether he had or not, beyond all question plaintiff was in the actual possession of this property, of these premises, for something over a year. Whether he did or did not pay rent, is not material in this action, and there is no pretense that he was ever notified by any one at any time to deliver up possession.

The acts of the defendant in this case, as shown by the evidence, even according to that introduced by defendant himself, authorized the giving of the instruction as to punitive damages. According to the testimony of Mr. Sturdy, constable and deputy sheriff, the defendant wanted him to put plaintiff out of the house. Sturdy asked him if he had any papers. Defendant said he had not, but, pointing to a desk in his

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office said to Sturdy, "Take any paper and read it; that would be sufficient." Sturdy declined, saying he could not "do anything like that." Thereupon defendant proceeded to the house and threw out plaintiff's property. That act was a high-handed attempt by the defendant to take the law into his own hands and forcibly dispossess plaintiff, who in no sense of the word was a trespasser upon the property.

We see no error in the instructions upon which the case was submitted to the jury, in fact no error is assigned to them, beyond the argument that no instructions on behalf of plaintiff should have been given, but that the instructions in the nature of demurrers asked by the defendant should have been given.

The judgment of the circuit court is affirmed.  
*Norton* and *Allen, J.J.*, concur.

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ISIDOR SIEGEL, Respondent, v. ILLINOIS CENTRAL RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted December 7, 1914. Opinion Filed January 5, 1915.

1. **WITNESSES: Impeachment: Competency of Witness.** The testimony of a witness that he knew the reputation of another witness for truth and veracity, and that it was not good, should not be stricken out merely because, on cross-examination, he is unable to give anything like a correct definition of the term "reputation for truth and veracity;" this merely affecting the weight of his testimony, which is a question for the jury to determine.
2. **CARRIERS OF PASSENGERS: Injury to Passenger: Derailment: Contributory Negligence.** In an action for injury to a passenger on a railroad train from a derailment of a car, where defendant did not plead contributory negligence, an instruction for plaintiff which, *inter alia*, charged that plaintiff was not guilty of contributory negligence, should not have been given, but the giving of it did not constitute reversible error.

3. ———: **Care Required of Carrier.** A carrier of passengers must, so far as it is capable by human care and foresight, carry passengers safely, and is responsible for injuries caused by the slightest negligence.
4. ———: **Injury to Passenger: Derailment: Res Ipsa Loquitur.** Where a passenger is injured by the breaking down or derailment of the coach in which he is riding, a prima-facie presumption arises that the accident was caused by the negligence of the carrier, and, to escape liability, it must show that the injury was the result of inevitable accident or some cause which human precaution and foresight could not have averted.
5. ———: ———: **Sleeping Car Passenger: Liability of Railroad Company.** A railroad company is responsible for the operation of a train to which a sleeping car is attached, although the latter is owned by an independent company, and hence is liable for negligent operation of the train, causing a derailment of such car and consequent injury to a passenger therein.
6. ———: ———: **Riding in Unauthorized Place.** A passenger on a railroad train, who, for a temporary purpose of his own, went into a sleeping car forming a part of the train, without paying the extra fare demanded for the privilege of riding therein, remained a passenger, and, as such, was entitled to recover for injuries sustained by reason of the derailment of such car while he was in it, although the coach in which he had been riding was not derailed.

Appeal from St. Louis City Circuit Court.—*Hon.*  
*William T. Jones*, Judge.

**AFFIRMED.**

*Watts, Gentry & Lee* for appellant; *J. G. Drennan* of counsel.

(1) The court erred, in giving, at plaintiff's request, an instruction on contributory negligence as follows: "The court instructs you that on the pleadings and evidence in this case plaintiff was not guilty of any negligence that contributed to or caused any of the injuries for which he sues." There was no plea of contributory negligence in this case. The defendant did not attempt to prove contributory negligence, hence the issue of contributory negligence was not in the

case, and was not an issue upon which instructions should have been given, for it is a well-settled rule of law that instructions should be given only on issues involved in the case. *Grout v. Railroad*, 151 Mo. App. 330; *Wood v. Railroad*, 188 Mo. 255. The effect of this instruction was to compliment the plaintiff and improperly emphasize the lack of contributory negligence on his part. (2) The court erred in refusing to give the instruction asked by defendant. The refusal of this instruction was error for which a new trial ought to be granted. There was evidence in the case to support all of the hypotheses of this instruction. The defendant contracted to carry the plaintiff in a certain part of its train, to-wit, the chair car. That part of the train was safely carried. The defendant was entitled to this instruction, based on the evidence offered by the defendant, which showed that the plaintiff, Siegel, was not in the chair car, but was in the Pullman sleeper "Kempton," where he had no right to be, and the defendant therefore owed him no duty in the Pullman car. If he had admitted that he was in the Pullman car at the time of the accident, the defendant would have been entitled to a peremptory instruction to the jury to find against him. But since he denied that, an instruction based on defendant's evidence, which showed that he was wrongfully in a Pullman car, ought to have been given. *Higgins v. Railroad*, 36 Mo. 418; *Feeback v. Railroad*, 167 Mo. 216; *Railroad v. Lane*, 83 Ill. 448; *Savage v. Railroad*, 164 Ill. App. 634; *Railroad v. Yarwood*, 15 Ill. 468; *Fletcher v. Railroad*, 187 Mass. 463.

*McShane & Goodwin and William Baer for respondent.*

(1) The court did not err in refusing defendant's instruction which in effect told the jury plaintiff could not recover if he left his place in the chair car and

went to the toilet room of the sleeper and while there was injured. Even if plaintiff went into the sleeper and was using the toilet facilities therein, such facts would not abrogate the *status* of passenger and carrier between himself and the defendant. 6 Cyc. 536-537, and footnote 26; *Wilmot v. Railroad*, 106 Mo. 535; *Railroad v. Lowell*, 151 U. S. 209; *Martin v. Railroad*, 51 S. C. 150; *Railroad v. Sandusky*, 14 Ky. Law, 768; *Railroad v. Bennett*, 82 Ark. 393. (2) The court did not err in giving the plaintiff's instruction number 3, withdrawing the issue of plaintiff's contributory negligence from the consideration of the jury. (a) The question of whether plaintiff was guilty of contributory negligence or not could have been made an issue, even though it had not been pleaded, if plaintiff's evidence tended to show such. *Ramp v. Railroad*, 133 Mo. App. 703; *Kappes v. Brown Shoe Co.*, 116 Mo. App. 172. (b) Even if the instruction was improper and not responsive to the issues, it does not constitute reversible error. *Bongner v. Zeigenhein*, 165 Mo. App. 328; *Briscoe v. Laughlin*, 161 Mo. App. 76; *Kiel v. Ott*, 168 Mo. App. 40; *Mullinax v. Lowrey*, 167 Mo. App. 445; *Tranbarger v. Railroad*, 250 Mo. 46; *Culver v. Fire Ins. Co.*, 141 Mo. App. 205; *Connelly v. Railroad*, 133 Mo. App. 310.

REYNOLDS, P. J.—Action by plaintiff for damages resulting from injuries sustained by him while a passenger on one of the defendant's trains. The petition is in the usual form, charging that while plaintiff was a passenger on the defendant's road in transit from Paducah, Ky., to St. Louis, Mo., the defendant "negligently and carelessly caused and permitted, in a manner to plaintiff unknown, the car which plaintiff boarded at Nashville, Tenn., in which plaintiff was then and there being transported by defendant, for hire, as aforesaid, to be derailed while moving rapidly, and wrecked, and thereby directly and proximately caused

plaintiff then and there to be injured and damaged." Specifying the damage, plaintiff demands judgment for \$10,000.

The answer is a general denial.

There was evidence on the part of plaintiff to the effect that he, a Russian Jew, had lived in this country for several years, but did not understand the English language very well. Intending to go to St. Louis to buy goods for his store, plaintiff boarded the train of defendant at Paducah, Ky., having purchased a ticket entitling him to first-class passage to St. Louis. He testified that when he reached Duquoin, Ill., he changed cars, boarding a train for St. Louis; that when he did so, he asked the conductor for a sleeper and the conductor told him that the train did not carry sleepers. He entered a car which he called "a Pull car," but which it appears was an ordinary day coach. Shortly after midnight he changed from that into a chair car, paying the conductor \$1.25, the extra fare charged for riding in that car. He took a seat near one end of the car and early in the morning awoke, and desiring to go to the toilet room, he tried the door of that room in the car in which he was riding and found it locked. He then went into an adjoining car, which it appears was a Pullman and was met by the colored porter, of whom he inquired where the toilet room was. The porter told him it would be "opened directly." Plaintiff testified that he went back into the chair car and was not sure whether he had sat down or was standing up when the car was derailed and he was thrown and received the injuries complained of, the car being thrown over on one side. The testimony of plaintiff was very positive that the car in which he had been riding—that is, the chair car—was the one which was derailed. He denied very positively that he was in the sleeper when the accident occurred. He was helped up and received medical and surgical treatment when the train arrived at St. Louis, par-



ticularly for a hurt to his ear which he claimed he had sustained in consequence of the accident. That, in substance, in the testimony of plaintiff.

On the part of defendant there was testimony to the effect that the chair car in which plaintiff had been riding was not overturned; that the wheels of the rear truck of that chair car had left the rails and ran along the ties for some ten or fifteen feet; that the chair car remained standing in such a position that anybody could sit in it or walk through it without any difficulty after the train stopped; that the sleeper immediately back of this chair car was the only car in the train that had turned over; that plaintiff was in this sleeper at the time he was hurt, attempting to wash in the toilet room; that the conductor of the sleeping car, seeing him there and in his socks, asked him what he was doing there and while they were talking the sleeper turned over. Plaintiff had told the porter of the sleeper, according to the latter, that he had a berth in that sleeper. Plaintiff was afterwards picked up by members of the train crew or perhaps others, and carried into a car of the train and brought to St. Louis.

The contention of defendant in this case is that plaintiff, not having a Pullman car ticket and not being entitled to ride in that car, was a trespasser and could not recover.

At the instance of plaintiff the court instructed the jury, in substance, that if they believed from the evidence that plaintiff was a passenger upon a train of defendant at the time he claims to have been injured, "then, having received plaintiff upon board of such train, the due obligation of defendant to plaintiff was to use the highest degree of care practical among prudent, skillful and experienced men in that same kind of business, to carry him safely, and a failure of the defendant (if you believe there was a failure) to use such highest degree of care would constitute negligence on its part; and the defendant would be respon-

sible for all injuries resulting to plaintiff, if any, from such negligence, if any. And if you believe from the evidence that plaintiff was a passenger on one of defendant's trains, and that said train upon which he was a passenger (if you find such), while being operated by defendant, and that the car or portion of said train on which plaintiff was a passenger (if you find such) became partially derailed, the presumption is that it was occasioned by some negligence of the defendant, and the burden of proof is cast upon the defendant to rebut this presumption of negligence and establish by the preponderance of all the evidence that there is no negligence on its part, and that the injury, if any, was occasioned by inevitable accident, or by some cause which such highest degree of care could not have avoided. *The court instructs you that on the pleadings and evidence in this case plaintiff was not guilty of any negligence that contributed to or caused any of the injuries for which he sues.*" Continuing, the court instructed the jury as to what they were to consider in determining the measure of damages, if they found in favor of plaintiff, awarding him not to exceed the amount prayed for in his petition.

On behalf of defendant, the court instructed the jury as to the credibility of witnesses; that the burden of proof is on plaintiff, defining that, and as to the weight to be given the opinion of experts.

In support of its theory, defendant asked the court to give to the jury the following instruction:

"If the jury find from the evidence in this case that passengers riding on the train on which plaintiff was riding at the time of the wreck referred to in this case were required to pay extra compensation before being allowed to ride in any sleeping car on said train; and if the jury further find from the evidence in this case that the plaintiff knew of said requirement at the time of and prior to said wreck; and if the jury further find from the evidence in this case that the plain-

tiff did not pay the extra compensation for riding in a sleeping car, but paid only such fare as would entitle him to ride in a day coach or chair car on said train; and if the jury further find from the evidence in this case that, without having paid such additional compensation, plaintiff entered a sleeping car constituting part of said train and attempted to use the washroom of said sleeping car, and knowing it to be a sleeping car, and to ride in said sleeping car, and that whilst plaintiff was in said sleeping car a wreck occurred and said sleeping car was overturned and plaintiff was injured, then the plaintiff is not entitled to recover and your verdict must be for the defendant."

The jury returned a verdict in favor of plaintiff in the sum of \$1750; judgment following, from which, interposing a motion for new trial and excepting to the action of the court in overruling it, defendant appealed.

The only points argued here for reversal of the judgment and only errors assigned, are to the giving of that part of the instruction which is italicized; the refusal of the instruction offered by defendant which we have set out, and to the action of the court in refusing to strike out evidence of plaintiff as to the reputation for truth and veracity of a witness, as it appeared by plaintiff's own testimony that he did not understand the meaning of reputation or truth and veracity.

Disposing of this latter contention, we do not think it tenable. It is founded on matter growing out of cross-examination of plaintiff as to the meaning of the words "reputation for truth and veracity." Plaintiff had testified in rebuttal, referring to a certain witness who had testified against him, that he knew the reputation of this witness for truth and veracity; that it was not good. Counsel for defendant cross-examined plaintiff as to what he understood by these terms and it developing that he could not give anything like a cor-

rect definition of them, counsel moved to strike out all of his testimony on the matter. This the court refused. We think there was no error in this ruling of the court. We are not holding that before a witness can be asked to state what the reputation of another is for truth and veracity, he must not first be asked if he knows that; that if he answers affirmatively he can then be asked what it is. But having so answered, it is then a matter for cross-examination to ascertain the basis and extent of his knowledge. The weight of the witness's testimony is then for the jury.

The only objection leveled at any instruction is to that part of the first instruction, which we have set out and underscored. We are unable to see that including this in the instruction was in any way harmful to defendant, as is argued. It is true defendant had not pleaded and was not relying upon the defense of contributory negligence and the theory upon which it introduced its evidence was not, strictly speaking on the theory of contributory negligence on the part of plaintiff but of nonliability of defendant, by reason of plaintiff being where he had no business to be. We do not think that this part of the instruction should have been given, but do not think that embodying it in that instruction constituted reversible error.

The main question in the case turns upon the refusal of the court to give the instruction we have set out, which was asked by defendant.

The law is well settled that a railroad company, engaged in the carriage of passengers, is required, so far as it is capable, by human care and foresight, to carry them safely, and it is responsible for all injuries to its passengers arising from even the slightest negligence on its part. When a passenger suffers injuries received in consequence of the breaking down or overturning of the coach in which he is riding, a prima-facie presumption arises that such casualty was caused by negligence on the part of the carrier, and the bur-

then is on the latter to repel such presumption and to show that the injury was the result of inevitable accident or some cause which human precaution and foresight could not have averted. [Furnish v. Missouri Pac. Ry. Co., 102 Mo. 438, 13 S. W. 1044; Clark v. Chicago & Alton R. R. Co., 127 Mo. 197, 29 S. W. 1013.] Both of these cases are followed and quoted from in Holland v. St. Louis & S. F. R. R. Co., 105 Mo. App. 117, 79 S. W. 508. There is no attempt on the part of defendant in this case to rebut the presumption made by the fact of the derailment and overturning of a car or cars of this train, or to attempt to show that the plaintiff received his injuries as the result of inevitable accident. As before stated, the sole contention of defendant, appellant here, is that plaintiff was in a place where he had no business to be and that if he had remained in his seat in the chair car, the accident would not have happened; that not having paid for riding in the Pullman or sleeper, he was where he had no right to be, and where the railroad defendant was under no obligation to him as a carrier; that plaintiff did not occupy the position of a passenger, so far as defendant was concerned by reason of his being in that Pullman sleeper. This refused instruction, in substance, was drawn on the theory that if the jury found that plaintiff was injured while in the Pullman, as the defendant contended, and as it introduced evidence very strongly tending to prove, and not while he was in the chair car, as plaintiff insisted, then plaintiff could not recover.

A railroad company, a common carrier, is responsible for the operation of the train to which a sleeping car or Pullman, as commonly called, is attached, or of which train it is a part, the sleeping car company, if the sleeping car is under a separate ownership, not being responsible for the operation of the train. [4 Elliott on Railroads (2 Ed.), sec. 1617a.] Mr. Elliott further says in his work above referred to and in

section 1625 of that edition: "In general, sleeping car or parlor car companies are distinct organization from railroad companies, and the coaches of the former are simply hauled as a part of the train by the latter, and the former ordinarily furnish the coaches, equipments and servants, having direct and full control of the employment and discharge of employees as well as of their conduct and duty." "But," says Mr. Elliott in the same section, "the relation between a railroad company and a sleeping car company is a peculiar one for the reason that the one company undertakes to carry the passengers and receives the compensation for carriage, while the other company simply undertakes to furnish additional accommodations and only receives compensation for such additional accommodations. There is, therefore, reason for holding that so far as concerns the duty of carriage the railroad company alone undertakes it, and is responsible for a breach of that duty. . . . The general rule is that for injuries to passengers resulting from negligence in the operation of the train or from defects in the roadbed or the like the railroad company is liable is, therefore, entrenched by sound principle."

We have found no case either in the decisions of the courts of our own State or elsewhere, exactly covering the particular point here involved and can only determine it upon the application to it of principles which underlie the responsibility of common carriers.

In *Holland v. St. Louis & S. F. R. R. Co.*, *supra*, the railroad company was refused an instruction to the effect that if plaintiff, after entering the car was furnished with a seat and voluntarily left it and was standing when thrown down by the jar, and that his so standing contributed to his injury, he could not recover. The Kansas City Court of Appeals held the instruction was properly refused, saying (l. c. 124): "It is true plaintiff was provided with a seat when he entered the car, but he afterwards got up and went into

the baggage department of the car and when he returned some one had taken his seat; and as there was none other unoccupied he was compelled to stand. It is hardly necessary to offer any reason to satisfy ordinary intelligence that a passenger has the right to leave his seat in a railroad car temporarily for any legitimate purpose, provided he does not expose himself to danger thereby."

Judge BLAND, speaking for our court, said in *Wagoner v. Wabash Railroad Co.*, 118 Mo. App. 239, l. c. 246, 247, 94 S. W. 293: "A railway company carrying passengers, discharges its primary duty to a passenger when he is safely seated in his car; if, after being so seated, he leaves his seat, while the train is in motion, and goes from his car to another on private business with another passenger, he assumes the risk of being thrown and injured by the ordinary motion of the train and cannot recover, unless he can show his injury was caused by the negligence of the company and that his own negligence did not contribute thereto." In the same case, in a separate opinion, Judge NORTON, speaking for himself and for Judge GOODE, has said, quoting from 2 *Shearman & Redfield on Negligence* (5 Ed.), sec. 524:

"Passengers have a right to presume that all passenger cars are equally safe; and they ought not to be restricted to any one. Nor can they be required to sit still. The law, which makes liberal allowance for the natural restlessness of dogs, must surely make equal allowance for the restlessness of the average man. Long train journeys are monotonous and trying, at their best; and active men find it impossible to sit still all the way. No special reason for moving need be assigned."

In the same work and section, and immediately following the portion quoted by Judge NORTON as above, it is said: "The only question is, whether, under all the circumstances, the act was one natural to

a prudent man, exercising his prudence. Slight reasons, such as a desire to smoke, or to drink, or because the car was not properly heated, have been held quite sufficient."

It is also said in the beginning of that same section 524: "There is no rule of law forbidding passengers on a train to change their seats or to move from one car to another, so long as they act prudently in doing so. Therefore the mere fact that an injury would not have been suffered, had the passenger remained in the seat or car which he first took, is not proof of contributory negligence."

While the point here involved is not expressly passed upon by our court in *Johnston v. St. Louis & S. F. R. Co.*, 150 Mo. App. 304, 130 S. W. 413, that case was decided on the assumption that the passenger has a right to move from one car to another, to leave his seat where he would be safe, and pass out of that car by way of the vestibule.

In *Costikyan, Admr. v. Rome, Watertown & Ogdensburg R. Co.*, 58 Hun. (65 N. Y. Sup.) 590, it is held that in the absence of instructions or notice from the company not to do so, a passenger in going from one car to another while the train was in motion, assumed only the ordinary risks incident to such action on his part and had a right to assume that appliances for moving the train were safe; that if injured while so doing in consequence of their not being safe, the railroad company is liable. This decision was affirmed by the Court of Appeals as see 128 N. Y. 633.

So the Texas Court of Civil Appeals held in *Sickles v. M., K. & T. Ry. Co.*, 13 Tex. Civ. App. 434, 39 S. W. 493. That also was substantially the holding of the Georgia Supreme Court in *Cotchett v. Savannah & Tybee Ry. Co.*, 84 Ga. 687.

In *Chicago, Milwaukee & St. Paul Ry. Co. v. Lowell*, 151 U. S. 209, it is held that even proof that the



passenger violated the rules of the company as to the manner and place of exit from the train, and even without the excuse of urgent necessity, would not, as a matter of law, debar him from a recovery.

In *Martin v. Southern Ry.*, 51 S. C. 150, a passenger was injured while attempting to board and ride a baggage car attached to a passenger train, on which train he was a passenger. The Supreme Court of South Carolina said (l. c. 155): "We do not think that the particular place where a person may be on a passenger train should necessarily and conclusively determine whether or not such person is a passenger. One who has paid his fare and procured his ticket may disregard some rules prescribed by the carrier, and yet such conduct on his part would not change the fact that he was a passenger, nor relieve the railway company from liability."

In *Illinois Central R. R. Co. v. Sandusky*, 14 Ky. Law 767, it is held by the Kentucky Superior Court, that a passenger has the right to occupy a car other than that in which he had been assigned or in which he had taken a berth, and was not guilty of contributory negligence in so doing.

While these cases are not precisely in point they serve to illustrate the respective duties and obligations of carrier and passenger.

Our conclusion in the case at bar is, on consideration and application of the authorities, that this instruction which was asked by defendant was properly refused. Plaintiff here had purchased a ticket entitling him to first-class passage on the train. The fact that he was injured while temporarily in the sleeping car attached to that train for some purpose of his own, if it is true, as the evidence tends to prove was the case, and for the purposes of this decision we will assume that it is the case here, does not take from the railroad company its obligation and duty to plaintiff as a passenger. He was a passenger, having paid

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full fare to ride on that train. Assuming that he was in the sleeper, where to ride involved payment of an extra fare, he not having paid that extra fare, he was still a passenger on that train.

Plaintiff was not attempting to ride in the sleeper as a regular passenger in it; he was there, in that car, casually; for a temporary purpose; to wash his hands. We would hesitate long and yield only to controlling authority to the contrary, before we would hold that by so acting, he, as a passenger entitled to ride on that train to which a sleeping car was attached, having paid full fare to ride on that train, was, by that act beyond the pale; that the carrier was absolved from its duty to him as a passenger. Yet this is what this refused instruction asked by defendant sought to have laid down as the law.

We see no reversible error in the case. The judgment of the circuit court is affirmed. *Nortoni, J.*, concurs. *Allen, J.*, not sitting.

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GEORGE W. MENEFEЕ, Respondent, v. LUTE  
DIGGS, Appellant.

St. Louis Court of Appeals. Argued and Submitted December 9, 1914. Opinion Filed January 5, 1915.

1. **INSTRUCTIONS: Conformity to issues: Waiver.** The general rule is, that instructions must be confined to the issues in the case as pleaded; but where, at the trial, evidence which is outside of the pleadings is introduced without objection, it is not error to instruct on these matters, as well as on the case made by the pleadings.
2. **VERDICT: Responsiveness to issues: Amount of Recovery.** Where plaintiff pleads a contract for an agreed commission for the sale of land, and defendant denies that he entered into the contract or that he is liable for the commission, a verdict for plaintiff for one-half the alleged contract price is outside of the issues and cannot stand.

Appeal from Montgomery Circuit Court.—*Hon. James D. Barnett*, Judge.

REVERSED AND REMANDED.

*E. S. Gantt* and *S. S. Nowlin* for appellant.

(1) Instructions should be confined to the issues presented by the pleadings and the evidence. *Home Bank v. Towson*, 64 Mo. App. 97; *Waddingham v. Hughlett*, 92 Mo. 528; *D. Donata v. Morrison*, 160 Mo. 581; *Glass v. Gelvin*, 80 Mo. 297; *Ely v. Railroad*, 77 Mo. 34; *Kelly v. Stewart*, 93 Mo. App. 47; *Kingman & Co. v. Buggy Co.*, 150 Mo. 282; *Rothschilds v. Fernsforf*, 21 Mo. App. 318; *Mansur v. Botts*, 80 Mo. 651; *Wright v. Fonda*, 44 Mo. App. 634; *Whitlock v. Appleby*, 49 Mo. App. 295; *Altman & Taylor Co. v. Smith*, 52 Mo. App. 351; *Whipple v. Building & Loan Assn.*, 55 Mo. 554; *Matney v. Railroad*, 75 Mo. App. 233. (2) Under the terms of the contract pleaded, plaintiff should recover, if anything, the full amount agreed upon. *Weisels Gerhardt & Co. v. Pemberty Investment Co.*, 150 Mo. App. 626; *Witty et al. v. Saling et al.*, 171 Mo. App. 574; *Cole v. Armour*, 154 Mo. 333.

*E. Rosenberger & Son* for respondent.

REYNOLDS, P. J.—Plaintiff brought his action against defendant for commission on an exchange of lands, the petition averring that, being a real estate agent and broker, and defendant being anxious and desirous of selling or exchanging 252 acres of farm land, of which he was the owner, entered into a contract with plaintiff, whereby he agreed that if plaintiff would find him a purchaser for the farm, or find some person who was willing to exchange other land for defendant's farm, that he, defendant, would pay plaintiff a commission of \$1 per acre, to-wit, \$252, for plain-

tiff's services in the matter. It is averred that, acting under this contract of employment, plaintiff produced and introduced to defendant one Norwood, then the owner of another farm, and had brought about an exchange between Norwood and defendant of their respective properties, and it is averred that defendant became indebted to plaintiff in the sum of \$252, payment of which, although demanded, was refused. Judgment is prayed for this amount with six per cent interest from date of demand, together with costs.

The defendant answered by a general denial.

The cause went to trial before the court and a jury and at its conclusion the jury returned a verdict in favor of plaintiff for \$126, judgment following. Defendant objected to the receipt of this verdict. His objections were overruled, and filing a motion for a new trial as well as one in arrest of judgment, and saving exceptions to the action of the court in overruling these motions, defendant has duly perfected his appeal to our court.

There was evidence in the case on the part of plaintiff tending to prove the contract as alleged, and to the contrary evidence tending to prove the absence of any contract, defendant himself specifically denying entering into the one in suit and denying that he employed plaintiff as his agent to make the exchange. During the progress of the trial evidence was introduced tending to prove that the defendant was also acting in the transaction as the agent for Norwood as well as for defendant, and that plaintiff knew of that. Defendant denied this. Plaintiff's testimony moreover tended to prove that he had not only told defendant of his agency for Norwood, but also told defendant that when he acted for both parties he was in the habit of dividing commissions and that he would do that in this case. This was also denied by defendant.

The errors assigned here by appellant are to the giving of two instructions at the instance of plaintiff

(marked 2 and 3) and to the refusal of the court to give an instruction asked by defendant.

Instruction No. 2 given at the instance of plaintiff told the jury in effect that a real estate agent is not permitted to act for both parties in an exchange of farm lands without the knowledge and consent of both parties to such exchange, but that if both parties to an exchange of lands know that a real estate agent is acting for both parties and consent thereto, then the real estate agent is entitled to his commissions from both parties, even if he is the agent of both, provided he is the procuring cause of the exchange and has been employed by both to bring about the trade.

Instruction number 3 was practically to the same effect, repeating the same idea in different language. It is complained of these instructions that they are outside of the issue pleaded.

Neither these nor any other instruction made any reference to any contract as to a division of commissions when the agent represented both parties.

The general rule is, that instructions must be confined to the issues in the case as pleaded, but it has been held in many cases that where at the trial of a case evidence is introduced without objection, which is outside of the pleadings, it is not error to instruct on these matters as well as on the case made by the pleadings. A leading case on that is *Mellor v. Missouri Pac. Ry. Co.*, 105 Mo. 455, 16 S. W. 849, a decision which has since been followed in very many other cases. In the case at bar the evidence bearing on this joint agency was introduced by both parties without objection on the part of either. Hence we see no impropriety in submitting that issue to the jury.

The instruction asked by defendant and which was refused by the court, was that if the jury found for plaintiff, their "verdict will be for the sum of \$252, no more and no less." As we have noted, the verdict of the jury was exactly one-half the amount for which

plaintiff sued. As before noted, no instruction was given which warranted the jury, if they found a joint agency, to divide commissions. By some sort of reasoning upon the part of the jury they probably believed that plaintiff was the joint agent of the two parties to the exchange, and that that being so, according to plaintiff's own testimony, his commission was to be divided between these parties, each being liable for one-half. If that was plaintiff's contract with defendant, it was not the contract pleaded. The only contract pleaded, as we have seen, is a contract for a specific sum of \$252. It was held in *Cole v. Armour et al.*, 154 Mo. 333, 55 S. W. 476, that where a plaintiff sued on a special verbal contract as was the case here, he must recover upon that contract or not at all. That is a well established rule. It has been enforced in many cases. Our court had the same question before it very recently, in two cases, each of them in cases in which commissions were claimed to have been earned in negotiating sales or transfers of real estate. In each of them it was held that, in an action on an express contract for a specified sum, as here, the issue raised by the answer denying the contract being whether there was a contract, and by that contract plaintiff being entitled to recover a specified sum, that a verdict for less than the specified sum will be set aside, on appeal, as not responsive to the issues. [See *Weisels-Gerhardt Real Estate Co. v. Pemberton Investment Co.*, 150 Mo. App. 626, 131 S. W. 353, and *Witty v. Saling*, 171 Mo. App. 574, 154 S. W. 421.] On the authority of these cases, the verdict and judgment in this cause will have to be set aside.

The judgment of the circuit court is accordingly reversed and the cause remanded. *Nortoni and Allen, JJ.*, concur.

**FERD BAUER ENGINEERING & CONTRACTING  
COMPANY, Appellant, v. ARCTIC ICE & STOR-  
AGE COMPANY, Respondent.**

**St. Louis Court of Appeals. Argued and Submitted December 8, 1914. Opinion Filed January 5, 1915.**

- 1. VERDICTS: Inconsistent Finding: Verdict on Claim and Counterclaim.** Where suit was brought on a contract for the stipulated price of doing certain work in accordance with its provisions and defendant denied that plaintiff was entitled to recover anything and filed a counterclaim for failure to do the work according to the requirements of the contract and within the time therein provided, a verdict in favor of plaintiff on its claim, and in favor of defendant on its counterclaim for an amount greater than the contract price for doing the work, is so inconsistent that it cannot be permitted to stand, since a verdict for plaintiff must necessarily be founded upon at least substantial compliance with the contract by it, while, on the other hand, defendant's right of recovery on the counterclaim depends upon a finding that plaintiff failed to substantially perform the contract.
- 2. APPELLATE PRACTICE: Errors Presumptively Prejudicial.** The broad presumption is, that errors of the trial court are prejudicial, and it devolves upon the person asserting their harmlessness to show such fact affirmatively, otherwise the presumption will prevail; but this rule does not obtain where it affirmatively appears that the error is so inconsequential as not to have prejudiced the party against whom it was committed.
- 3. BUILDING CONTRACTS: Breach: Damages: Minimization: Excessiveness of Recovery.** In an action to recover the balance due on the stipulated price of \$1300 for erecting a structure in accordance with the provisions of a contract, where defendant set up a counterclaim in which it asked for damages for failure of plaintiff to do the work according to the requirements of the contract and within the time therein provided, *held* that the evidence did not make it appear that defendant suffered damages to the amount of its recovery on the counterclaim—\$1478.71; *held, further*, that defendant did not seek to minimize the damages, as it was required by law to do.
- 4. DAMAGES: Breach of Contract: Minimization.** It is the duty of one injured by the breach of a contract to minimize the damages.

Appeal from Audrain Circuit Court.—*Hon. James D. Barnett*, Judge.

REVERSED AND REMANDED.

*Wilfred Hearn* for appellant.

(1) The court erred in giving instruction number 4 of its own motion—(a) Because under the pleadings there could not be a recovery in favor of plaintiff on the cause of action set out in count 1 of plaintiff's petition, and at the same time a recovery in favor of defendant on its counterclaim. *Johnson v. LaBarge*, 46 Mo. App. 433. (b) Plaintiff recovered on a special contract, not on a *quantum meruit*. A recovery of *quantum meruit* cannot be had on a count of special contract. *Rude v. Mitchell*, 97 Mo. 365; *Moore v. Gaus & Sons Mfg. Co.*, 113 Mo. 98; *Cole v. Armour*, 154 Mo. 336; *Davis v. Drew*, 132 Mo. App. 503. (2) The court erred in receiving the verdict of the jury and entering the same of record, because the verdict was inconsistent and contradictory. *Johnson v. LaBarge*, 46 Mo. App. 433.

*Fry & Rodgers* for respondent.

(1) In an action on contract it is proper for defendant, if he has been damaged by a breach of the contract but retains and uses the article or thing for which he owes, to set up his damage by way of counterclaim. *Boetler v. Roy*, 40 Mo. App. 234; *Hay v. Short*, 49 Mo. 139; *Brown v. Weldon*, 23 Mo. App. 263; *Johnson v. O'Shea*, 118 Mo. App. 287; *Manufacturing Co. v. Mission*, 174 Mo. App. 723; *Ritchie v. Hayword*, 71 Mo. 560; *State, etc., v. Modrell*, 15 Mo. 424; *McAdow v. Ross*, 53 Mo. 199. (2) The fact that the appellant did not complete the work within the time limited therefor by the contract, nor do all of it ac-



cording to the contract, does not preclude it from suing on the contract when respondent has accepted and used the tower. But respondent can counterclaim the damages sustained by it by reason of the contractor's failure to comply with the contract. *Blakely v. Neil's Lumber Co.*, 141 N. W. 179; *Cummings v. Pence*, 27 N. E. 631; *Campbell v. Summerville*, 114 Mass. 334; 3 *Elliott on Contracts*, sec. 2112; *Railroad v. Clanton*, 31 Am. 15; *Mears v. Nichols*, 89 Am. Dec. 381; *Yeamans v. Parker*, 63 N. W. 316; *Glennon v. Lebanon Mfg. Co.*, 12 L. R. A. 321; *Natural Gas Co. v. Healy*, 10 S. E. 56. (3) The whole tendency of modern jurisprudence is to enlarge the scope of set-off or counterclaim and, where possible, settle all disputes in one suit. *Nelson v. Troll*, 173 Mo. App. 67; *Railroad v. Zant Imp. Co.*, 6 L. R. A. (N. S.) 1058; 34 Cyc. 629, 644, 645, 682.

REYNOLDS, P. J.—Plaintiff, appellant here, brought its action against defendant to recover \$678.71, claimed to be the balance due for the erection of a cooling tower, for which, upon the erection and completion of the same according to the contract and specifications, defendant was to pay plaintiff \$1300. Averring that the tower had been erected and completed according to the contract evidenced by a proposal and specifications set out in the petition, and that defendant had paid \$621.29 on account of the contract price, plaintiff demanded judgment for the balance together with interest and costs.

After a general denial of all the allegations in the petition, the answer of defendant sets up a counterclaim averring that according to the contract, the tower was to be erected and the work on it completed so that it would operate by April 5, 1911, and that it had not been completed until some time in November, 1911, and alleging various defects in it, defendant claims that it has suffered damage by reason of plaintiff's failure to comply with the terms of the con-

tract, in the sum of \$2040, for which it demands judgment.

Replying to this by a general denial of the averments of this part of the answer, the reply avers that after the erection of the cooling tower in controversy, plaintiff was notified by defendant that the tower was defective and did not operate in accordance with the terms of the contract, and that thereupon plaintiff offered to remedy whatever defects there were in the tower but that defendant had refused to allow plaintiff to make these corrections until about the month of November, 1911.

There was a trial before the court and a jury and a verdict in favor of plaintiff on the cause of action set out in its petition in the sum of \$678.71, and a verdict in favor of defendant on its counterclaim in the sum of \$1478.71. Judgment, by *nunc pro tunc* entry, correcting the original judgment, was entered in favor of defendant for \$800, the difference between the amount awarded plaintiff on its cause of action and that awarded defendant on its counterclaim. Interposing a motion for a new trial and excepting to the action of the court in overruling that motion, plaintiff has duly perfected its appeal to this court.

The only errors assigned by counsel for appellant are on the fourth instruction given to the jury by the court of its own motion, to the action of the court in receiving the verdict of the jury and entering it of record, and in overruling defendant's motion for a new trial.

That fourth instruction is as follows:

"If the jury find in favor of plaintiff on the cause of action set out in count one of plaintiff's petition, and also find in favor of defendant on its counterclaim, the verdict may be written in the following form:

"We the jury find in favor of plaintiff on the cause of action set out in count one of plaintiff's peti-

tion and we assess the amount of plaintiff's recovery on the counterclaim at the sum of

(Insert the amount.)

'We further find in favor of defendant on defendant's counterclaim and we assess the amount of defendant's recovery on the counterclaim at the sum of

(Insert the amount.)' "

It is argued that this instruction is misleading; that it misled the jury into returning an inconsistent verdict and is contradictory. While the only error assigned is to the giving of this fourth instruction and to the action of the court in receiving the verdict in the form given, we have examined the other instructions given at the instance of plaintiff and defendant. In effect, the jury were instructed that if plaintiff had performed the work under the contract within a reasonable time after entering into the contract, their verdict should be for plaintiff for the contract price, less any sum they found had been paid by defendant. The court further instructed the jury that if they found from the evidence that after the tower in controversy had been erected, defendant began the use and occupation of it and thereafter discovered defects therein which could have been remedied, and that defendant neither caused the defects to be remedied nor permitted plaintiff to remedy them, but continued the use and occupation of the tower to its damage, defendant would not be entitled to recover on its counterclaim for any damage sustained after the defects were discovered, which damage could have been avoided by the correction of the defects; and if they found that plaintiff had erected the tower within a reasonable time after being employed to do so, and that within a reasonable time after notice of the failure of the tower to conform to the contract, had offered to make it conform thereto, but that defendant would not permit plaintiff to do so until on or about November 15, 1911, and that on that date plaintiff did repair the

tower and make it conform substantially to the contract, then their verdict should be for plaintiff for the amount of the contract price less whatever the jury found had been paid thereon. These instructions were given at the instance of plaintiff.

At the instance of defendant the court instructed the jury that the parties had entered into the contract attached to the petition and read in evidence. Summarizing what the contract obligated the plaintiff to do, the court instructed the jury that if they found from the evidence that defendant complied with and discharged the duties and obligations imposed upon it by the contract and that plaintiff failed to comply with the duties and obligations imposed upon it and that defendant was damaged by plaintiff's failure to comply with the terms of the contract, they should find for defendant on its counterclaim, assessing the damages on its counterclaim as explained in other instructions.

The third instruction particularized the items for which defendant might be allowed on its counterclaim.

With these instructions before it and in the light of the evidence in the case, so far as it is presented, the appellant in its abstract stating that there was evidence introduced by each party tending to support the allegations of their several pleadings, and the respondent, by an additional abstract, setting out what it considered the most material evidence in detail, we cannot say that this verdict is not so inconsistent as to warrant a reversal of this case, and we are bound to say that with this evidence before us, we are unable to understand the verdict and apply to it that evidence.

The petition was in two counts, one upon the contract and the other in *quantum meruit*. The latter was abandoned, leaving the action on the contract. Hence a recovery could be had by plaintiff only upon a finding that plaintiff has at least substantially performed the contract. While this does not mean that a recov-

ery is to be denied for failure to comply with the contract with respect to trivial or nonessential matters, it certainly must mean that it must be found that there was substantial performance. [Boteler v. Roy, 40 Mo. App. 234, l. c. 238.]

On the other hand, defendant's right of recovery on the counterclaim interposed depends upon a finding that plaintiff failed to perform the contract whereby the damages accrued to defendant which are sought to be recovered by way of counterclaim.

Any verdict for plaintiff for the balance claimed to be due upon the contract must necessarily be founded upon at least substantial performance of the contract by plaintiff; while on the other hand the verdict for defendant on its counterclaim must necessarily be founded upon a failure of plaintiff to substantially perform the contract whereby the damages awarded defendant were occasioned.

We are unable to see how these two findings can be permitted to stand; for they are altogether contradictory and self-destructive. The verdict is evidently the result of a misconception on the part of the jury of the issues of fact to be tried by them, and their failure to comprehend the instructions given by the court. As to this the case of Johnson v. Labarge, 46 Mo. App. 433, appears to be directly in point. So too is Ruth v. McPherson, 150 Mo. App. 694, 131 S. W. 474, and Barr & Martin v. Johnson, 170 Mo. App. 394, l. c. 398, 155 S. W. 459, where Judge STURGIS, speaking for the Springfield Court of Appeals, has said: "Under the facts in this case it would not be possible for a jury to find for plaintiffs on the theory that they had complied with the contract and yet award damages to the defendants for their failure to comply with such contract."

In this case as in Johnson v. Labarge, *supra*, either party might have appealed upon the ground that it was prejudiced by the verdict; for the plaintiff might

well take the position, as it does here, that since the jury found that it had substantially performed the contract, it was entitled to recover, and to have no damages awarded against it on the counterclaim; while on the other hand defendant might, with equal propriety, take the position that since the jury had found that plaintiff had breached the contract, defendant was entitled to its damages for the breach without the same being cut down by the amount awarded plaintiff.

Where, as here, the verdict of the jury is not responsive to the pleadings, is in the very teeth of the instructions, and altogether fails to resolve the issue of fact presented to the jury, it appears that either party may justly assert that he is prejudiced thereby in that he had not had a trial and a finding upon the issues in the case. The broad presumption is, that errors of the trial court are prejudicial, and that it devolves upon the parties asserting their harmlessness to show such fact affirmatively, otherwise the presumption will prevail. [See *Hatch v. Bayless*, 164 Mo. App. 216, l. c. 223, and cases there cited; 146 S. W. 839.] The apparent exception to this is where it affirmatively appears that the error is so inconsequential as not to constitute prejudicial or reversible error. [Shinn v. United Rys. Co., 248 Mo. 173, l. c. 182, and cases there cited; 154 S. W. 103.] We are unable to see that such can be said to be true here. Every litigant is entitled to have the real issues of fact in his case actually resolved by those who sit in judgment thereupon, and is not compelled to abide by the verdict which attempts to resolve those issues both in his favor and in that of his adversary.

Here it appears that the contract price for the erection of the tower in question was \$1300; \$621.29 was paid on that and plaintiff sues for the balance of \$678.71. As the record now stands it is denied any further recovery, and there is a judgment against it for \$800. If this is permitted to stand, plaintiff not

only receives nothing for the erection of the tower, but is compelled to pay defendant \$178.71 in addition, though the evidence in the record does not make it appear that defendant suffered damages to the extent of \$1400 for which it ought to be compensated. It further appears that defendant did not seek to minimize the damages as the law requires that it should have done.

The judgment of the circuit court is reversed and the cause remanded. *Nortoni* and *Allen, JJ.*, concur.

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STATE OF MISSOURI, Respondent, v. ADOLPH  
TIETZ, Appellant.

St. Louis Court of Appeals. Submitted on Briefs December 10, 1914.  
Opinion Filed January 5, 1915.

1. **CRIMES AND PUNISHMENTS: Child Abandonment: Instructions: Necessity of Covering Case.** Under Sec. 5231, R. S. 1909, it is obligatory on the trial court, in criminal cases, to cover the whole case by instructions; and hence, in a prosecution for child abandonment, under Sec. 4495, as amended by Laws 1911, p. 193, where defendant requested the court to charge on the defense relied upon, that the wife refused to live with defendant in the habitation provided by him, or to let him take the children, *held* that the defense should have been covered by proper instructions.
2. **CHILD ABANDONMENT: Elements of Offense: Sufficiency of Evidence.** Under Sec. 4495, R. S. 1909, as amended by Laws 1911, p. 193, declaring it to be an offense, if a man, without good cause, abandons his child, under the age of fifteen, and fails, neglects or refuses to provide for it, there must be a concurrence of abandonment without good cause, with criminal intent, and of failure to furnish it necessaries; and hence, where the mother, having the custody of children, refused the father's offer to provide a home and care for them, and they were provided for by their grandparents, the father was not guilty of the offense denounced by the statute.

Appeal from St. Louis County Circuit Court.—*Hon.*  
*G. A. Wurdeman*, Judge.

REVERSED.

*Osmund Haenssler* for appellant.

(1) The State must prove each and every element of the alleged abandonment by defendant of his children, including his criminal intent to abandon his children, and a refusal to provide for them. *State v. Greenup*, 30 Mo. App. 299; *State v. Brinkmann*, 40 Mo. App. 284; *State v. Satchwell*, 68 Mo. App. 39; *State v. Doyle*, 68 Mo. App. 219; *State v. Linck*, 68 Mo. pp. 161. (2) The defendant offered to take the children and offered to support them if the wife would come and live with him; the offer to support is a good defense. *State v. White*, 45 Mo. 512. (3) The statutory crime of abandonment is not established, notwithstanding an abandonment might be proved, where the wants of the child or children are provided for by others. *State v. Thornton*, 232 Mo. 298. (4) The trial court failed, neglected and refused to instruct on all points of law involved in the case. *State v. McCaskey*, 104 Mo. 644; *State v. Patrick*, 107 Mo. 147; *State v. Nelson*, 118 Mo. 124. (5) The court erroneously refused to permit the defendant to prove by his witnesses the fact that the prosecuting witness refused to permit him to have the children when he was ready and able to furnish them with a suitable home. *State v. White*, 45 Mo. 512; *State v. Thornton*, 232 Mo. 298.

*Arthur V. Lashly*, Prosecuting Attorney, for respondent.

(1) The intent to criminally abandon and fail to provide for and support his children may be gathered from the acts and conduct of the defendant, and it is not necessary to specifically prove the intent where it is not alleged in the indictment or information. *State*



v. Beverly, 201 Mo. 550; State v. Schloss, 93 Mo. 361; State v. Hall, 85 Mo. 669.

REYNOLDS, P. J.—The prosecution was commenced against the defendant before a justice of the peace in St. Ferdinand township, St. Louis county, on complaint of the former wife of defendant, the prosecution being instituted under section 4495, Revised Statutes 1909, as amended by the Act of March 30, 1911 (Laws 1911, p. 193), for the abandonment of two of his children, born in lawful wedlock, etc., both of the infants under fifteen years of age.

It is in evidence that the parties were living at Vigus, in St. Louis county, having originally lived in St. Charles county. At Vigus they lived with the father and mother of the complaining witness, and at St. Charles with the father and mother of the defendant. Along in May or June, 1911, defendant went to St. Charles, resuming his residence with his father and mother. At St. Charles he was at work on the railroad as a laborer, earning \$1.50 a day. He had also worked at the car shops in St. Charles. The complainant was the divorced wife of defendant and under the decree of divorce it appears, although neither that decree nor the record in it was in evidence, that she resumed her maiden name of Caktion. The cause of the divorce appears to have been desertion, but it seems that the decree did not make any award of the custody of the children nor award alimony or maintenance. The parties had been married at St. Charles, in October, 1907. The older child was born at St. Charles, some time in 1908, the younger child was born at Vigus, in St. Louis county, in 1911. During their marriage, as before stated, they had never kept house themselves but had lived at St. Charles with the parents of defendant or of his wife, and when in St. Louis county they with their children had lived with the parents of the complaining witness until the death of her mother, then with her

father. After they had been living in St. Louis county for some time, and defendant had returned to St. Charles, he asked his wife to take up housekeeping there by themselves. She refused to do this. When she left her husband in St. Charles and moved to the residence of her parents in St. Louis county, she neither consulted her husband about it, nor said anything to him of her intention. The first he knew of it was when he found she had left. At the time of her confinement in St. Louis county, defendant attended to her and waited on her, coming from St. Charles for that purpose, and remained with her in the home of her father in St. Louis county for some three weeks, working as a section hand. When the complaining witness recovered from her confinement and the baby then born to them was about six weeks old, defendant again asked her to go back with him to St. Charles and go to housekeeping there. She refused to do this.

While the parties were at St. Charles on the last occasion, and at the home of the parents of defendant, he requested her to stay at St. Charles and go to housekeeping, his father and mother offering them the use of their house, and defendant's brother offering them a house and the wife a complete set of household and kitchen furniture, if she would live with her husband in St. Charles. She refused this offer, saying that she "did not want to take any dead person's furniture," and did not want her sister-in-law's furniture, meaning by that that her brother-in-law's wife had died, it being the house in which he and his wife had lived until the death of the latter, the house still furnished. Mrs. Caktion, the prosecuting witness and former wife of defendant, testified that there was adequate and sufficient household furniture for them, and the house that they offered her and her husband was suitable, but that she refused to occupy a house which had been occupied by her brother-in-law and his wife before the death of the latter, or to use their furniture. The house, she said,

was large enough for herself and husband and children and adequate and was in a respectable part of the town.

There was testimony tending to prove that on the occasion of the confinement of his wife in 1911, defendant had lived in the house with her and their children and her father, all living on a farm, defendant living there three or four weeks and working for the Rock Island Railroad as a section hand and earning \$1.50 a day. There was testimony tending to prove that while defendant had not directly contributed anything toward the support of his children or either of them while they were living in St. Louis county, that his father-in-law and an uncle of his wife had bought most of the family supplies, but that the latter looked to, or supposed defendant would pay him for things he—the uncle—had bought. Defendant, it is in evidence, had run bills for a lot of family supplies, and which he had not paid. A lot of bills were contracted for by defendant, as a witness testified, although they were at that time living with her father and mother and they had not been paid. These bills were for food for his wife and children and for his father-in-law. The goods had been charged to defendant and the uncle paid for them on the understanding that defendant could pay him back at his leisure, when he was able to do so. The father of the prosecuting witness testified that the prosecuting witness had been living with him ever since she had been married, having been married four or five years. They had moved to St. Louis county from St. Charles county, defendant coming over to the St. Louis county residence late in the spring of 1911, remaining there about three weeks, working on the railroad with his father-in-law, getting \$1.50 a day and living with his father-in-law, his wife and children there. He did not contribute anything to the support of his children while he was there; was there when the last child, the baby, was born, and had not yet paid the doctor bill for services on that occasion. When defendant and his wife

lived with this witness there was no agreement with him about his paying any expenses, witness paying them himself; did not know of defendant paying a penny toward the support of his wife and children; did not know exactly when defendant left the St. Louis county residence; was in the habit of coming and going whenever he got ready; has not been back since he finally left; came then to get his clothes. The mother of the two children are still with her father, the latter saying that he supposed they would be until he died.

In his own behalf defendant testified that he resided at St. Charles, Missouri; that his wife at that time was living in St. Louis county; prior to that she had lived with him in St. Charles. When she moved to St. Louis county, he testified that all he knew about it he heard from some of the neighbors, who told him she had moved to St. Louis county. He first visited her there on the 14th of May, 1911, on the occasion of the death of her mother; remained there that evening, coming back to St. Charles and returned to Vigus on the 15th of May, the following day, going to the funeral of his wife's mother. He then returned to St. Charles but went back to Vigus a few days afterward, his wife having requested him to come to Vigus, telling him that if he would come back to Vigus, she would go to housekeeping with him at St. Charles. She was then about to be confined. After his wife's mother died, defendant asked her to go to housekeeping with him and asked her to be confined at his mother's home in St. Charles. She refused, saying she wished that to happen at Vigus. While at Vigus he waited on his wife while she was sick and after she was able to be up he worked at Vigus about three weeks, then got another job at St. Charles, where he could make more money and asked his wife to move with the children to St. Charles. She said that she would not; that if she moved she "would move further up the road." Asked whether he was willing at the time

he left to take his children with him, he answered that he was. This was objected to, objection sustained, defendant excepting. On cross-examination he stated that when he left Vigus, the youngest child, which had been born there, was about a month old; that while he was working at Vigus he got \$1.50 a day, working there two or three weeks; did not give his wife any of the money that he earned for the children. Asked if he had ever had a home since he was married, he said "Yes," at his father's home. Asked if he had ever provided a home of his own, he said he had, at West Highlands, after his wife's mother died but neither he nor his wife ever lived in it. During all their married life they lived with his wife's father. Asked if it was a fact that during that time the wife's father had supported the whole family, he said, "No, sir, he did not;" that he (defendant) had supported his family a great deal of the time, although not all of the time. Since the 15th of May, or the 15th of June, up to the time of the trial he had not provided anything for the support of these children; was not then working, although able to work. On redirect examination he testified that during the time that he contributed to the support of the family, they were all living with his father-in-law, and that he helped provide for them. Asked if the children needed anything at the time he was at Vigus in the way of food or clothing, the question was objected to and the objection sustained, defendant excepting.

Defendant's father, being called as a witness by defendant, was asked what property he had in St. Charles, defendant's counsel stating that they proposed to show the amount of property he had and offered to show that he had property which he had offered to his son. This was objected to and excluded, defendant duly excepting. At the time of the son's marriage, the father testified, his son had no property. Asked by defendant's counsel whether he (witness)

had offered to assist his son he answered, "Yes." The question was then objected to, the objection sustained, defendant excepting. Counsel for defendant then offered to show by this witness that defendant had a home provided with every necessity and a place to take his wife and children to, to show that he had provided a proper and suitable place to take them to, and that they refused to go with him. The court sustained this objection, holding that "children of these tender years could neither refuse nor accept anything of the sort." Defendant duly saved exception. Defendant thereupon offered to show by another witness, the mother of defendant, that a home and everything was provided for this defendant's wife and children and that they were asked and requested to come there and did not. The court asked counsel if they meant to show that the wife "was offered to come there and go there with her children?" Counsel for defendant answered, "Yes, Your Honor, and that she was asked to come there and be confined and receive all the care and treatment necessary." This was objected to, objection sustained and defendant duly excepted. Counsel for defendant then offered to show by another witness that this house, which was offered to the prosecuting witness, was provided and furnished with the necessary furniture to provide a home for people in their circumstances. This was objected to and excluded, defendant excepting. Defendant's counsel then offered to show by another witness that he had heard defendant request his wife at Vigus to come with him at St. Charles and live there; that he had a home provided and that the wife refused, stating that if she moved she would go further up the road. On objection of the attorney for the State this offer was refused, defendant excepting.

This is substantially all the testimony in the case. At the close of it defendant asked an instruction to the effect that under the law and evidence defendant was not guilty as charged in the information and that the

jury should find him not guilty. This was refused, defendant excepting.

At the instance of the State the court instructed the jury, in substance, that if they found from the evidence that at the township of St. Ferdinand, in the county of St. Louis, State of Missouri, the defendant, within one year before the filing of the information in this case, was the father of two children, one three years old, the other four months old, naming them, "and did unlawfully, wilfully and without good cause abandon said children and failed, neglected and refused to maintain and provide for them, then you will find the defendant guilty as charged in the information," defining the punishment as prescribed by statute.

It further directed the jury at the instance of the State that the information is a mere formal charge and not in itself any evidence against the defendant, who, in law, is presumed to be innocent; that this presumption attends him throughout the trial until his guilt is proven beyond a reasonable doubt, and that the jury could not convict him unless the State had proven his guilt to their satisfaction and beyond a reasonable doubt; that if, upon the consideration of all the evidence in the case, the jury had a reasonable doubt of defendant's guilt, they should give him the benefit of the doubt and acquit. "Reasonable doubt" was properly defined.

The court further instructed the jury that defendant is a competent witness in his own behalf but the fact that he is the defendant and as such interested in the result of the case, may be considered in determining the credibility of his testimony, yet, as a whole, the jury should receive and consider his testimony like that of any other witness, subject to the same rules, as explained in other instructions. Defendant duly saved exceptions to the first instruction.

Of its own motion the court instructed the jury that their verdict could only be returned by the consent of all twelve of the jurors agreeing to it.

At the instance of defendant the court instructed the jury that they were the sole judges of the credibility of the witnesses and then followed this with an elaboration by what rules the credibility of the witnesses was to be determined, concluding with the direction that if the jury found that any witness had wilfully sworn falsely as to any material matters involved in the trial, the jury might reject or treat as untrue the whole or any part of the witness's testimony. This was the only instruction given at the instance of the defendant.

The defendant then requested seven instructions, all of which the court refused. The first of these refused instructions was to the effect that before the jury could convict, they must find that defendant "abandoned his children, under the age of fifteen years, without good cause and with criminal intent, and with such intent failed to provide for said children;" that a mere abandonment by defendant of his children and a failure to support them, does not prove the criminal offense charged in the information; but that the State must prove to the jury, beyond a reasonable doubt, that the defendant had not good cause for the alleged abandonment of his said children and that the alleged abandonment was with the intention to not provide for them in the future, regardless of their needs and situation, and unless the jury so believed beyond a reasonable doubt, that defendant without good cause did, at the time and place alleged in the information, abandon his children, under the age of fifteen years, with the intent not to provide for them in the future, regardless of their needs and circumstances, they must acquit defendant and find him not guilty of the offense charged in the information in this case.



In another of the refused instructions, numbered 5, the court was asked to charge the jury that if they believed from the evidence that since the date of the alleged abandonment, the defendant secured, at St. Charles, Missouri, a house and furniture necessary for a home for his wife and children and asked his wife to come to this home with their children and live with him, and if they further believed from the evidence that the proffered home was such as was sufficient for his station in life, then it was the duty of defendant's wife to go with her children to the home so secured by defendant, "if you further find from the evidence that defendant's wife, without good cause, refused to live with defendant at the home so secured by him and refused to let him have his children that he might provide for them according to his means, you must acquit the defendant and find him not guilty."

Another of the refused instructions, numbered 6, was to the effect that the law does not require defendant to pay his wife any sum of money for the support of the children; "that he, as their father, had the right to their custody, and if you find that he offered to take said children and provide for them, that said offer was made in good faith and that defendant was able, by the assistance of his parents, to care for such children, but that his wife refused to give them to him, you must find the defendant not guilty."

Another refused instruction was to the effect that if the jury found and believed from the evidence in the case that defendant, after he and his wife separated, offered to take the care and custody of the children and made the offer in good faith, but that his wife refused to give him the custody of the children, but retained them in her own custody, and that they there received sufficient shelter, food and clothing, they must acquit defendant.

Other of these refused instructions were covered by the instructions given by the court at the instance

of the State or of its own motion and are not necessary to set out.

All these were refused, defendant duly saving exception.

The jury returned a verdict of guilty of child abandonment, as charged in the information, assessing the punishment at a fine of \$200. Judgment followed, from which defendant has duly perfected his appeal to this court.

A conviction in this case cannot be sustained.

It is said in *State v. Vollenweider*, 94 Mo. App. 158, 67 S. W. 942, a case of wife abandonment, that had the defense rested on the ground of a good cause for abandonment, it would have been the duty of the court to have defined the cause or causes that would in law excuse the defendant. That was the defense in this case but the trial court refused all of the instructions asked by defendant on this theory, among others, those we have designated as 5 and 6, which instructions set up the defendant's defense that he had good cause, to-wit, the abandonment by his wife, she taking the children with her, refusing him any opportunity to provide for them. In the instructions which the court did give, it in no way covered this defense. By statute and by numerous decisions, it is obligatory on the court in criminal causes to cover the whole case by instructions. We are not holding that these refused instructions are technically correct, or that they should have been given in the form asked. But the court, by proper instructions should have covered the defense. So that on the action of the court on the instructions, we would be compelled to reverse the judgment.

A very careful reading of the entire transcript of the testimony satisfies us that this not such a case as falls under the statute upon which the prosecution is founded, that is to say, section 4495, Revised Statutes 1909, as amended by the Act approved March 30, 1911 (Session Acts 1911, p. 193), and that the defendant

should not have been convicted. In so concluding we pass over the action of the court on the exclusion of evidence, with the remark that the action was error for which the judgment would have to be set aside. But on the evidence which was admitted and is before us, the conviction cannot stand.

We have in this State, in addition to this section 4495, as amended in 1911, and upon which this prosecution is founded, section 4492, Revised Statutes 1909, which provides: "If any mother of any infant child, under the age of sixteen years, or any father of any such infant child, born in or legitimized by lawful wedlock, . . . shall, without lawful excuse, refuse or neglect to provide for such infant . . . necessary food, clothing or lodging, or shall unlawfully and purposely assault such infant or apprentice, whereby his life shall be endangered or his health shall have been or shall be likely to be permanently injured, the person so offending shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding one year, or by a fine of not more than \$1000, or by both such fine and imprisonment." This section has been construed by our Supreme Court in *State v. Thornton*, 232 Mo. 298, 134 S. W. 519, which we will refer to hereafter. It is the only decision under this section which we have found.

The first act covering the offense of wife and child abandonment of which we are aware, was the Act of 1867 (see Acts 1867, p. 112); 1 Wagner's Stat. (Ed. 1872), secs. 34 and 35, p. 497. This act made it a misdemeanor for every husband, without good cause, to abandon his wife, and fail, neglect or refuse to maintain or provide for her; "or who shall, without good cause, abandon his child or children, under the age of twelve years, born in lawful wedlock, and fail, neglect, or refuse to maintain and provide for such child or children." This went into the revision of 1879 as section 1273, the two sections of the Act of 1867 being

consolidated into one. This section is word for word that of section 3501, in the revision of 1889, and section 1861, revision of 1899. By the Act of June 4, 1909 (Acts 1909, p. 450), this section 1861 was amended by confining its operation exclusively to wife abandonment. At the same session and by the same act, that is the Act of June 4, 1909, what is now section 4492, which had been section 1857, of the revision of 1899, was amended so as to read as we have before noted, making the offense a felony. So stood the law until 1911, when by the Act of March 30th of that year (Laws 1911, p. 193), section 4495, Revised Statutes 1909, was amended and section 1861 of the revision of 1899, re-enacted, the only change in it being that the age of the child was raised from twelve to fifteen years.

It will be noticed that in the Thornton case the learned judge who wrote the opinion laid stress on the word "necessary," holding that section 4492 carried a punishment for failure to provide "necessary" food. The word "necessary" is not used in section 4495 as amended by the Act of March 30, 1911, but that section, as we understand it in the light of the decisions which have construed it and its predecessors, does relate to necessary provision for the wife and children, as clearly as if that word had been used. We think the decisions under it demonstrate this.

The first decision that we have found in which what is now the amended section 4495, was in State v. White, 45 Mo. 512, referring to that section as it appeared in the Acts of 1867, before cited. In that case the defendant, among other evidence, proposed to ask a witness if the defendant had not rented a house from him which defendant's wife refused to occupy. This question, on objection, was excluded. Our Supreme Court said: "The question clearly went to the merits of the issue. If defendant furnished his wife with a suitable residence, he had so far contributed to her support; and if she refused to occupy it, it certainly was not his

fault." For the refusal to allow this question to be asked, the judgment of conviction in that case was set aside.

In *State v. Newberry*, 43 Mo. 329, it was held that in a prosecution under this section, the wife was competent to swear to the complaint.

These are the only two cases in which we find this section to have been considered by our Supreme Court, until in *State v. Thornton*, supra, the corresponding section 4492, as we have before remarked, was construed.

Our court in *State v. Wonderly*, 17 Mo. App. 597, had before it the construction of this section, then section 1273, Revised Statutes 1879, where the prosecution was for the abandonment of a wife and child. Commenting on a verdict which the court held to be excessive and that it had been rendered so by the admission of improper testimony, the court said (l. c. 601): "It was shown that the wife had a home at her father's, where she was always comfortably provided for and preferred to remain; so that no element of destitution or family suffering occasioned by the defendant's neglect was apparent in the case."

In *State v. Greenup*, 30 Mo. App. 299, a prosecution against the husband for abandoning his wife, referring to the fact that the defendant had written several letters to his wife after their separation, soliciting her to come to him and live with him at his own home, and representing that he was able to provide for her and promising her good treatment in case of her good behavior, our court has said (l. c. 301): "We see no evidence in the record tending to show that she would not have been well provided for and kindly treated if she had complied with these repeated requests. She refused to comply with them." Commenting on this state of affairs, our court further said (l. c. 303):

"This is a criminal action. The State, and not the wife, is the complaining party. . . . Two elements are essential to constitute this offense: The criminal intent to abandon without cause, and the failure and refusal to provide for the wife. [State v. Fuchs, 17 Mo. App. (l. c.) 461.] In order to make out its case, the State must show, beyond a reasonable doubt, the existence of both of these elements. Evidence of a mere abandonment and a subsequent failure and refusal of support does not prove the criminal offense denounced by the statute. The State must further show that the defendant had not 'good cause' for the abandonment. The State must show this, although it involves the necessity of proving a negative; for the rule in this State even in civil cases is, that where the plaintiff grounds his right of action in the negative averment, and the proof of the affirmative is not peculiarly within the knowledge and power of the defendant, the establishment of the negative is an essential element of the plaintiff's case. [State v. Schar, 50 Mo. 393.] In this case the *absence* of 'good cause' for the abandonment, if such existed, was not a fact peculiarly within the knowledge of the defendant, and, therefore, the State was bound to prove it in order to sustain a conviction of a criminal charge. . . . In this record we discover no such evidence in support of the averment of the indictment that the abandonment was 'without any good cause whatever.' . . . A husband, it has been well said, is bound to provide for his wife in his family; and while he is guilty of no cruelty to her, and is willing to provide for her a home and all necessities there, he is not bound to furnish them elsewhere. [McCutchen v. McGahry, 11 Johns. (N. Y.) 282, per Platte, J.; Rutherford v. Coxe, 11 Mo. 353, per Napton, J.] In a latter case Judge NAPTON, speaking for the Supreme Court, said: 'The question is one of desertion; and we hold that the wife is bound to follow the fortunes of her

husband, and to live where he chooses to live, and in the style and manner which he may adopt.' *Messenger v. Messenger*, 56 Mo. 337."

It is true that *Rutherford v. Coxe*, *supra*, is to recover for the value of necessities furnished the wife, and *Messenger v. Messenger* was an action for divorce. Their application to the case at bar is that they are illustrative of the point that an offer to return, if made in good faith, breaks the force of the desertion. These two cases, that is the Fuchs case and the Greenup case, were followed and approved in *State v. Brinkman*, 40 Mo. App. 284.

In *State v. Brinkman*, *supra*, the rule announced in *State v. Greenup*, *supra*, is repeated, namely, that to constitute the offense of wife abandonment, there must be, first, the criminal intent to abandon without good cause; second, the failure to provide for the wife. At page 288, it is said by Judge Biggs, speaking for our court:

"It is quite clear that the State failed to show by satisfactory proof that the defendant with criminal intent, abandoned his wife without 'a good cause.' The reasons assigned by her for leaving her house were, if true, insufficient to justify her in the course pursued. According to her own statement she abandoned her husband, while he was at work, without notice or warning to him of her intentions. The only excuse given by her for her unusual conduct was that her husband failed to pay his bills."

Our court concludes that the evidence in the case was insufficient to show that the defendant has abandoned his wife without good cause.

In *State v. Broyer*, 44 Mo. App. 393, referring to the Greenup, Fuchs and Brinkman cases, *supra*, our court repeats that it is absolutely necessary for the State, in a prosecution under this section, to establish that the defendant abandoned his wife "without good cause" and with criminal intent and that he failed and

refused to provide for her, reciting the evidence which tended to show that the husband had tried to get work but had been unable to do so. In that case it appeared that the young couple were living with the mother of the wife. She (the mother) became tired of boarding the defendant and ordered him either to secure employment or leave her house. Says our court (l. c. 395): "As the first alternative was impossible, he was compelled to accept the latter. Wherein was this abandonment of the wife, without cause, and with a criminal intent?"

In *State v. Good*, 46 Mo. App. 515, a prosecution for abandonment of wife and child, and failing, neglecting and refusing to support them, the judgment of conviction was reversed and the cause remanded for the introduction of prejudicial and improper evidence.

In *State v. Weber*, 48 Mo. App. 500, a prosecution for wife abandonment, a decision by the Kansas City Court of Appeals, the rule is repeated that in order to constitute the offense, two things must concur, viz.: The husband must have abandoned his wife and, in addition, must have failed or refused to maintain or provide for her. Two elements, says the court, go to make up the offense under the statute, to-wit, desertion or abandonment, and nonsupport, and unless both these are shown the prosecution must fail. This same rule is announced in *State v. Satchwell*, 68 Mo. App. 39; *State v. Linck*, 68 Mo. App. 161; *State v. Doyle*, 68 Mo. App. 219.

It is true that most of these cases which we have referred to are cases of wife abandonment, but it is to be noted that in section 4495, as amended, the words "without good cause," apply to abandonment of the child just as fully as to abandonment of the wife. So that while it is said in the decision that to constitute the offense of abandonment of the wife, the abandonment must be "without good cause," and must



be with criminal intent to abandon, we must hold that to be equally true with respect to abandonment of the children and failure to provide them with support. The mistake which the learned trial judge fell into is evidenced by his ruling on one of the questions asked, and which ruling we have quoted, to the effect that "children of these tender years could neither refuse nor accept anything of the sort," referring to the offer of defendant to provide a home and care for his wife and children. Of course these children were too young to consider any offer. But they were in the custody of their mother; the offer was to her for herself and for them. She was the only one to whom it could be made and she refused it. That refusal stands as exculpation of the defendant, even as against these children. These children were those who were to be provided for and to be furnished with necessaries. The mother had them in her sole charge and she refused the offer.

In *State v. Thornton*, *supra*, it is distinctly held (l. c. 306), "that if the infant children are receiving necessary food, clothing and lodging from any source, there is no occasion for the State to interfere by penal law or otherwise." These children were certainly receiving necessary food, etc., from their grandparents, even if it is not clear that the father supported them, and while the *Thornton* case arose under section 4492, we see no reason to place a different construction upon a case, as here, under section 4495 as amended. So much as to failure of defendant to support these children.

When we consider the abandonment feature we find that instead of him abandoning his children without good cause, the evidence conclusively shows that the abandonment was on the other side, the wife taking the children from him and refusing him their custody and care. It is not to be overlooked that this section of the statute uses the words abandon and failure to maintain in the conjunctive; providing that if any man

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State ex rel. v. Buerman.

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“shall, without good cause, abandon or desert his wife, or abandon his child or children under the age of fifteen years, born,” etc., “*and* shall fail, neglect or refuse to maintain them, he shall, on conviction,” etc. That is, two things are necessary to constitute the offense, abandonment of the children *and* failure, neglect and refusal to maintain and provide for them. If either fails the offense is not under the statute. So it is expressly held in *State v. Weber*, *supra*. Here, on the clearest possible evidence, both of these elements are lacking.

Our conclusion is, that under the evidence this defendant was improperly convicted; that there is no evidence warranting his conviction under this statute. [*State v. Fuchs*, 17 Mo. App. 458.]

The judgment of the circuit court is accordingly reversed and the defendant discharged. *Nortoni* and *Allen, JJ.*, concur.

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STATE ex rel. CATHERINE COYNE et al., Relators,  
v. WILLIAM BUERMAN et al., Judges, Respondents.

St. Louis Court of Appeals. Submitted November 17, 1914. Opinion  
Filed January 5, 1915.

1. MUNICIPAL CORPORATIONS: Proceedings for Incorporation: Validity of Petition: “Taxable Inhabitants.” Under Sec. 8529, R. S. 1909, providing that, whenever a majority of the “inhabitants” of any unincorporated city or town shall present a petition to the county court, setting forth the metes and bounds of their city or town and commons, and praying that they may be incorporated and a police established for their local government and for the preservation and regulation of any commons pertaining to such city or town, if the court shall be satisfied that a majority of the “taxable inhabitants” of such town have signed such petition, it shall declare such city or town incorporated, a petition signed by a majority of the *taxable* inhabitants is sufficient.

2. ———: ———: ———: Failure to Describe Commons. A petition for the incorporation of a city, under Sec. 8529, R. S. 1909, which alleged that there were no commons was not defective because of the failure to describe any commons and to pray for the incorporation of the city for the preservation and regulation of such commons.
3. ———: ———: Including Farm Lands. While county courts have no right to incorporate farming or agricultural lands, as such, into cities or towns, yet lands used for agricultural purposes solely may become so surrounded and connected with lands used for town and city purposes as to constitute a part thereof, and in such case they may be included within the corporate limits.
4. PROHIBITION: Municipal Corporations: Proceedings for Incorporation: Prohibition Against County Court. That agricultural lands were included within the boundaries of a proposed city, where this did not appear on the face of the petition for incorporation filed in the county court, that the petition was not signed by the requisite number of taxable inhabitants, that the county court was about to proceed to have testimony taken out of court, in the absence of the parties and in an irregular manner, for the purpose of determining whether the parties whose names appeared on the petition had in fact signed it, or that a fraud was about to be perpetrated, would not justify prohibition to prevent action by the county court, as prohibition lies only when there is a lack of jurisdiction or where there are acts in excess of jurisdiction, and all of these matters were within the jurisdiction of the county court and to be determined by it in the first instance, though its judgment, when made, might be void and open to attack by *quo warranto*.
5. ———: ———: ———: ———. That the proposed incorporation of a city might lead to further litigation, or to unsettled conditions, though regrettable, afforded no legal ground for restraining the incorporation by prohibition, especially as to halt threatened litigation is the office of the writ of injunction, and not of prohibition.

### Prohibition. Original Proceeding.

WRIT QUASHED.

*Randolph Laughlin* for relators.

No brief filed for respondents.

REYNOLDS, P. J.—This is an application for a writ of prohibition against the judges of the county court of St. Louis county to prohibit them from proceeding with the consideration of a petition for the incorporation of the city of Uniondale in St. Louis county.

It is averred in the petition for the writ, that the county court is exceeding its authority and jurisdiction in entertaining the proceedings, and in further proceeding therewith, and in that it contemplates taking further judicial action beyond the scope of its jurisdiction, while claiming to be proceeding under and by virtue of section 8529, Revised Statutes 1909. It is averred that among the reasons why respondents have no authority or jurisdiction to entertain the petition, and no authority or jurisdiction to declare the territory therein described an incorporated city, are:

(a) Because the petition was not presented to the county court by a majority of the inhabitants, as required by law, and does not purport to have been so presented, but does purport to have been presented by a majority of the taxable inhabitants; it being averred as a matter of fact that the territory described in the petition contains 1150 inhabitants, 558 of whom would be necessary to constitute a majority, and the petition does not purport to have been presented by more than 302 taxable inhabitants.

(b) Because the petition does not purport to be a petition of the inhabitants of any city or town of the State not incorporated but purports to be a petition of certain inhabitants of the territory in the petition described.

(c) Because the territory described is not in point of fact an unincorporated city or town but is composed of three different classes of property, to-wit: (1) The small residence settlement of Home Heights. (2) Agricultural lands outside of and beyond the limits

of Home Heights. (3) Integral parts and portions of the unincorporated town of Overland.

The petition then alleges facts which are relied upon as showing the inexpediency of the incorporation of the proposed limits.

It is further alleged that the petition is fatally defective and insufficient for the reason that it does not pray "for the preservation and regulation of any commons appertaining to such city or town," it being claimed that that averment is jurisdictional. A further reason alleged is that the petition presented to the county court is not for the incorporation of territory but of the petitioners. Another reason assigned is that the petition presented to the county court is defective, in that it appears upon the face thereof that it is not signed by a majority of the taxable inhabitants and is not presented by a majority of all the inhabitants. Still another reason alleged against the petition is, that the order which on its part the county court proposes to make would be unreasonable, in that the effect of the order would be to compel eighty-one families to pay for the building of a school house in Home Heights to which they have no access; will have the effect of depriving eighty-one families of access to a certain school house which they now use; will defeat the incorporation of Overland, another town proposed to be incorporated and composed of part of the same territory.

As another reason it is urged that the incorporation of the proposed town would establish a precedent whereby the provisions of section 8529, Revised Statutes 1909, can be disregarded and a small residence community be permitted to appropriate to its own use large sections of agricultural territory with which it is in nowise connected and also reach over and appropriate large sections of an unincorporated city or town.

A final ground assigned as to why prohibition is asked and should be granted is that for the county court to proceed in the matter of incorporation and order incorporation, would produce litigation by farmers who will resist incorporation, and by families who will be driven from one school district to another, all of which, it is averred, considering the uncertainty of its outcome, "will stagnate the district, strangle development, and greatly delay improvements which are now imperatively needed by the entire community." These averments, it is set out, are made in support of the contention that the respondents have no jurisdiction whatever to enter the order for the incorporation of Uniondale which they propose to enter.

The following allegations, it is averred, have to do with the charge that the respondents are exercising an excess of jurisdiction, even assuming that they have jurisdiction to enter the order, namely: That the respondents are, and at all times hereinafter mentioned were, and ever since the filing of the petition for the incorporation of Uniondale have been, engaged in the improper and unlawful practice of taking testimony out of court, and in the absence of the parties in interest, for the purpose of satisfying themselves whether or not the persons whose signatures are now attached to the petition for the incorporation of Uniondale did sign the original petition to incorporate the city of Uniondale, and that a large number of persons (including petitioners) have filed remonstrances with the respondents, wherein they allege that the signatures attached to the petition for the incorporation of Uniondale were not signed to the original petition at all, but were signed, in many cases, to petitions for an improvement in school facilities, and in other cases to blank pieces of paper which it was represented to them were intended to be attached to petitions for increased school facilities, and in other cases to petitions for an election to vote on bond issues for increasing school facili-

ties; that in avowed pursuit of an effort to satisfy themselves whether a majority of the taxable inhabitants of the territory described in the petition for the incorporation of Uniondale had signed such petition, the defendants had printed slips of paper to the effect that the signers certify, in the presence of two witnesses by signing his name thereto, that he did sign the original petition to incorporate the city of Uniondale; that the respondents have selected witnesses of their own, each to go forth and cause these slips to be signed by the persons whose signatures are attached to the petition for the incorporation of Uniondale; that they purpose and intend to receive said slips as competent, relevant and sufficient evidence to meet the requirements of section 8529, and that relators, petitioners here, have been permitted to have no voice whatever either in the selection of the witnesses or their method of procedure or in the manner in which they shall persuade the persons, whose signatures they propose and intend to get, whether that thing which said persons did in fact sign was or was not the original petition to incorporate the city of Uniondale; that the petitioners have objected to this method of procedure, have asked the respondents to desist therefrom, and have reasoned with them that this method of procedure was and is extrajudicial, and that the evidence to be procured thereby would and will be wholly incompetent and worthless, nevertheless the respondents proceed in their determination to be satisfied or not to be satisfied, according to what such secrets *ex parte*, hearsay and incompetent evidence shall disclose.

Filing with their petition the certified copy of the proceedings, including what is claimed to be the original petition for the incorporation of Uniondale, relators pray for an order perpetually prohibiting the county court of St. Louis county from proceeding in the matter of the hearing and determination of the petition for the incorporation of that city.

The return of the respondents, after setting up that they are the duly elected and qualified judges of the county court of St. Louis county, avers that on August 17, 1914, a petition for the incorporation of Uniondale in that county was filed with the county court; that on the 28th of August, the petition was read in open court and a public hearing set by the court for the 14th of September, and notice of this hearing advertised by insertions in two newspapers published in the city of Clayton in the county; that on the 14th of September the hearing was continued by the county court to the 28th of September and that prior to the opening of the county court on that date, the judges of the county court were served with the alternative order of prohibition in the case. Denying all knowledge or information as to the other matters averred in the petition, the respondents aver that they neither admit nor deny the truth thereof. The return further challenges the petition in that it does not state facts sufficient to authorize the issuance of a writ of prohibition. Along with this return the respondent filed a certified copy of what they allege to be the petition for the incorporation of Uniondale, and which it is admitted by relators' counsel is in all respects like the certified copy filed with the original petition, with three exceptions: First, whereas the copy filed with the petition for the writ contained no signatures of the petitioners whatever, that filed with the return contained 302 signatures; second, whereas the copy filed with the petition was certified as of date August 17th, the copy filed with the return was certified as of date October 16th, and third, whereas the copy filed with the petition was certified to by the county clerk, the copy filed with the return was certified by the deputy.

The cause, on being called for hearing on the return day, was submitted by counsel on the above petition and return and exhibits, counsel being granted



time in which to file briefs. Delay in filing these is the cause of our delay in disposing of the case.

On consideration of the case we have concluded that prohibition will not here lie. This for several reasons.

The petition for the incorporation of the city of Uniondale as a city of the fourth class purports to be signed by a majority of the "taxable inhabitants" of the territory, using the words "taxable inhabitants," instead of the more general term "inhabitants." It is true that section 8529 of the statutes, provides that "whenever a majority of the inhabitants . . . shall present a petition," etc., but it concludes, "and if the court shall be satisfied that a majority of the taxable inhabitants of such town have signed such petition, the court shall declare such city or town incorporated." Taxable inhabitants would seem to be the more reasonable interpretation, for it can hardly be intended that children, minors, are to be counted, although they are inhabitants. That taxable inhabitants is meant is clearly decided by our Supreme Court in *State ex inf. Attorney-General v. Woods*, 233 Mo. 357, 135 S. W. 932, where at page 376, Judge LAMM says that the county court may grant incorporation on "first being satisfied that the majority of the taxable inhabitants have signed the petition." So it is held in *State ex rel. Attorney-General v. Fleming*, 158 Mo. 558, l. c. 562; 59 S. W. 118.

Passing this recital in the petition for the incorporation of the proposed city, the petition sets out that the territory proposed to be incorporated is composed of subdivided property and is suitable and is used only for residence purposes; that the territory contains more than 500 and less than 3000 inhabitants; that it is not adjacent to or within two miles of the limits of any second or third class city in St. Louis county. The metes and bounds of the proposed city are then given; so is the proposed name, and it is further stated:

“There are no commons located within the proposed city and there are no commons in any way belonging thereto.” The prayer is that the petitioners may be “incorporated as a fourth-class city and a police established for their local government under the name of Uniondale in St. Louis county, Missouri, according to the metes and bounds hereinbefore set forth.” Following this are the signatures.

In the Woods case, *supra*, the petition was held defective, in that it did not contain what was there held to be a necessary, a jurisdictional, averment, that is, that the inhabitants were to be incorporated “for the preservation and regulation of any commons pertaining to said city or town,” and it was solely for the lack of this averment that our Supreme Court held in that case that there was lack of jurisdiction in the county court. It is distinctly said in the Woods case, *supra* (l. c. 377): “We are not saying that a petition need set forth the metes and bounds (or pray for the preservation and regulation) of commons if there are no commons. That would be absurd and courts are not allowed to unnecessarily put absurd constructions on statutes. We are saying that the statute means that where there are commons—any such parks, public pleasure grounds or other public grounds, as come fairly within the designation of commons—they should be set forth by metes and bounds in the petition and the prayer should refer to them in apt and statutory way, and that where there are no commons that fact should be alleged as an excuse for the absence of a description by metes and bounds, and such prayer,” etc. That disposes of the point that the petition for incorporation presented to the county court was fatally defective in that it did not describe any commons, for it is set out in the petition for incorporation that “there are no commons in any way belonging thereto.”

Turning to the other averments of the petition for the incorporation, we find that they exactly conform

to the requirements of the statute as that statute is interpreted by our Supreme Court in the Woods case, supra (l. c. 376), where it is said: "When that kind of a petition is presented, . . . the court has power to act in creating a new governmental agency, incorporating a town. It, first being 'satisfied that a majority of the taxable inhabitants have signed the petition,' goes on to give judgment." Having jurisdiction, prohibition will not lie, unless other averments disclose its lack. Let us examine these.

It is averred in the petition for the writ of prohibition that the boundaries of the proposed city include agricultural lands and it being averred that farm lands cannot be included within the limits of a city, it is contended that the county court has no power to grant incorporation. There are several answers to this.

In the first place it is said by our Supreme Court in *State ex rel. Scott v. Lichte*, 226 Mo. 273, l. c. 284, 126 S. W. 466, quoting from *State ex inf. Attorney-General v. Fleming*, 158 Mo. 558, l. c. 566, 59 S. W. 118: "While it is true that the county courts of our State have no right to incorporate farming or agricultural lands, as such, into cities or towns, as was attempted in the *McReynolds* case (61 Mo. 203), yet lands used for agricultural purposes solely, may become so surrounded and connected with lands used for town and city purposes, as to be and constitute a part thereof, so that the incorporation of the town or city would, as a necessity, include within its natural boundaries such lands, and this court has three times held since the opinion of the *McReynolds* case, supra, that the inclusion of small tracts of agricultural lands within the corporate limits of the unincorporated town would not operate to defeat the corporation thus created."

In *State ex inf. Rosenberger v. Town of Bellflower*, 129 Mo. App. 138, 108 S. W. 117, our court held that the county court, in incorporating a townsite, may take in tracts of land used exclusively for agricultural pur-

poses, where it is necessary to do so. This is expressly approved by the Supreme Court in State ex rel. Scott v. Lichte, supra, l. c. 285.

That agricultural lands are included within the boundaries of the proposed city does not appear on the face of this petition for incorporation. To the contrary, it is there stated that the "territory is composed of subdivided property and is suitable and is used only for residence purposes." If on the hearing of the case and entering up judgment of incorporation, assuming that such conclusion is reached, the county court improperly includes more territory than is warranted, its action is not only not conclusive, but is void (State ex inf. Rosenberger v. Town of Bellflower, supra), and may be attacked in a proper proceeding. [State ex rel. v. McReynolds et al., 61 Mo. 203; State ex inf. Attorney-General v. Fleming, 147 Mo. 1, 44 S. W. 758; State ex rel. Attorney-General v. Fleming, 158 Mo. 558, 59 S. W. 118; State ex inf. v. Gooch, 175 Mo. App. 270, 157 S. W. 846.] These cases are ample authority for the proposition that all the matters herein set out and complained of are matters to be reached by *quo warranto*, not by prohibition.

It is within the jurisdiction of the county court to determine whether agricultural lands, beyond what is proper, are included within the corporate limits of the proposed city. That would involve a question of fact which that court has power to solve in the first instance, its conclusion on this, as well as to whether the requisite number of taxable inhabitants have petitioned for incorporation, being, if void, open to attack by *quo warranto*. Prohibition only lies when there is lack of jurisdiction, or acts in excess of jurisdiction. [State ex rel. v. McQuillin, 260 Mo. 164, 168 S. W. 924.]

Every one of the matters suggested by the learned counsel for the relators are matters to be first determined by the county court. It is true that in the peti-

tion for the writ, fraud is charged, but very vaguely, as about to be perpetrated. Even in a direct attack by *quo warranto*, "unless fraud and collusion on the part of (the county court) is charged and proven, or unless fraud has been so practiced upon it, in the matter of procuring the order," and "the fraud be distinctly charged, the action of the county court in making the order of incorporation, is not open to attack. [State ex inf. Attorney-General v. Fleming, 158 Mo. 558, l. c. 562, 59 S. W. 118.] We cannot, in proceedings for prohibition, assume that the county court will err in its judicial determination of these questions, nor can we assume, in this proceeding, that their judgment will be procured by fraud, nor that they will improperly proceed in the conduct of the case. They have a right to proceed, even a right to commit error, in those proceedings. Their determination when made, is a judicial act, a judgment. [Cases supra.] Nor can we interfere with the action of that court in its manner of verification of signatures to the petition for incorporation, nor assume that it will proceed in the very irregular way suggested. That is within the judicial discretion of the court.

In brief, the subject-matter of the incorporation of cities of the fourth class is within the jurisdiction of the county court, where, as here, a legal petition for incorporation is presented. The return of respondent is that they had set this case for hearing and were about to proceed in the hearing when halted by our alternative writ. We cannot presume that the county court will err in its mode of procedure or in the final determination of the case. We cannot even here assume that it will grant incorporation. Hence no case is here presented warranting our interference with its action by prohibition. In a case very much like the one at bar (State ex rel. Scott v. Lichte, supra), our Supreme Court held that prohibition would not lie. The decision in that case is controlling here.

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Meek v. Meek.

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It will be a matter of regret if the proceedings are of such a character as lead to further litigation and to unsettled conditions. That is inseparable from controversies, not alone in the courts, but between individuals, when in the course of any proceeding, a dispute arises. But that is in itself no legal ground, no reason in law, why a superintending court should interfere with the exercise of a jurisdiction lodged by the Constitution and the statutes in a subordinate tribunal. To halt threatened litigation is the office of the writ of injunction, not of prohibition.

The alternative writ of prohibition heretofore issued is quashed and a writ of prohibition denied. *Norton* and *Allen, JJ.*, concur.

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HANNAH E. MEEK, Appellant, v. W. K. MEEK,  
Appellant.

Kansas City Court of Appeals, December 21, 1914.

1. **DIVORCE: Evidence.** In an action for divorce by the wife and cross-bill by the husband the trial court found against both parties. On appeal the evidence is examined and the conclusion reached that the wife was entitled to the divorce.
2. —: **Separation and Return: Condonation.** If the husband continuously abuses his wife until her condition is intolerable and she leaves him and then returns, and this is repeated seven times, through a series of years, and her return each time is on his promise to change his conduct and treat her better, there is no condonation, and a breach of his promise revives the offense.

Appeal from Buchanan Circuit Court.—*Hon. Wm. H. Haynes*, Judge.

REVERSED AND REMANDED (*with directions*).

*Kendall B. Randolph* for appellant.

*Goldman & Liberman* for appellant.

ELLISON, P. J.—Plaintiff's action was instituted to procure a divorce from defendant. He filed a cross bill in which he asked a divorce from her for her fault. The trial court refused each of them and each appealed to this court.

The petition alleges the parties were married in December, 1889, and lived together until August, 1913. The ground of divorce is indignities, becoming finally so continuous and gross as to compel her to leave him. Among these were frequent assaults and batteries, serious threats and overwork. Defendant's cross bill, in turn, charges indignities against plaintiff, consisting in her leaving him eight times, in cursing him, threatening to poison him and in "corresponding with men." The words of the charge of desertion are these: "That she has at eight different times left defendant's home and gone away for a considerable period of time, and afterward returned to defendant and promised to behave herself and defendant has each time forgiven her."

The evidence showed both parties to be high tempered and that each used profane words of abuse to the other. Her language, while not to be justified, was called out by extreme provocation. Passing by these incidents, we think it established that he struck her with a chair, that he frequently assaulted her with his hands, that he pulled her hair and tore away a neck tie she wore and choked her. Defendant owned a good farm and there was much work to do in and about the house. Plaintiff did this work, sometimes it was exceedingly heavy. Whether work put upon the farmer's wife approaches cruelty, or abuse, depends much on her health and strength and knowledge of how it should be done; and whether the work she is required to do is unreasonable, depends much on the husband's means and their situation in life. If he is financially able he employs assistance for himself in the labor

usually performed by men and so, in such situation, he should employ help for her in the arduous duties usually performed by women in the house and about the premises. It is hard to determine from the record whether plaintiff's work approached cruelty or was even unreasonable, the circumstances considered. So therefore we pass by that phase of the case and take up that where the evidence is clearer.

We think defendant's own testimony bears out our statement that he assaulted her. His explanation of how he struck her with the chair is poor. He said that wanting to wash his feet on the porch, he asked her to get him a chair, that she did so, but in giving it to him, she set it on one of his corns "and I threw it off of my foot and if it struck her I did not know it." That he "just pushed it off his corn." On cross-examination he said "I pushed it with my foot back into the house, and if it hit her, I did not know it." Plaintiff's testimony and that of her daughter showed clearly that he threw the chair at her and struck her on the leg with much force. In regard to choking her, he said he jerked a neck tie off her neck because "she was tantalizing me about other men;" and "If I choked her that was the only time."

Furthermore we think it established that he told her that he had gotten some one to kill her on the road. It is perhaps true that he had not in fact done so, but he admitted to a reliable witness that he had so threatened her, without intending to carry it out.

At one time she had him arrested for "abuse." The constable took a neighbor along and arrested him and took him to his (constable's) house, and kept him in custody an hour or two, but she remained away for some time and he came several times and "begged her to come back and promised her different things, and she stuck to it and they finally decided to divide up and let her have her things." This was done, but after-



wards he sought her out and persuaded her to come back.

It is certain that the several times she left him were caused by conditions which had become unbearable to her and that he was the cause of these conditions there was ample testimony, corroborated, we think, by the circumstances of his own conduct in going after her and persuading her to come back by many promises of easier conditions and better treatment. He testified that on one of these occasions she told him that "I would rather die than go home with you."

Some of the charges against her were of a very damaging character. It was brought out that she struck him with a barrel stave. But we think that was shown to be accidental and defendant concedes that she immediately disclaimed intending it. Then one witness who had worked for them, testified to a remarkable story to the effect that when defendant was about to sell some hogs, she told the witness that she would get some chloroform and "send him to sleep," if he (the witness) would gag her and tie her hands, and then give the alarm. She denied the story and the statement of the witness standing alone is not sufficient to convince us that she made such proposal. It seems that he never attached enough importance to it to warn defendant. Again there were some letters in evidence which were written by her at times when she had left him and one that she did not write. It would serve no purpose to enter into a lengthy analysis of these. Suffice it to say that each of these parties had suspicions (we think ill founded in each) as to the appearance of something taken to be a powder, or some sort of poison. One of these concerned plaintiff's desire that it be tested by an expert. Throwing aside the letter which we think was not shown to have been written by her, there was nothing to affect her right to relief.

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It would be impractical to enter into a discussion of every incident which appears in the record. We have not noticed defendant's suggestion that plaintiff did not prove a good character, for the reason that we think the evidence in that respect was ample. Nor have we noticed the charge that at one or more times when she left defendant, she took money with her, for the reason that we have not thought it sufficient to interfere with her complaint. Nor do we need to notice the suggestion of condonation, further than to say that we have not found an offense by plaintiff for defendant to condone. And as for plaintiff's return to him, it was under the promise and the hope of better treatment. When the promise is broken, so likewise is condonation. [Moore v. Moore, 41 Mo. App. 176; Guthrie v. Guthrie, 26 Mo. App. 566; Welch v. Welch, 50 Mo. App. 395; Viertel v. Viertel, 123 Mo. App. 76.]

The judgment will be reversed and the cause remanded with directions to enter a decree of divorce for plaintiff for the fault of defendant, and that the trial court grant plaintiff such alimony as may, upon hearing, be found to be proper. All concur.

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GEORGE W. RUNYAN, Respondent, v. THE  
MARCELINE COAL & MINING CO., Appellant.

Kansas City Court of Appeals, December 21, 1914.

1. **DAMAGES: Mines and Mining: Failure to Furnish Props: Contributory Negligence.** A miner requested props but they were not furnished as required by the statute, Sec. 473, R. S. Mo. 1909. He had removed the dirt beneath the vein of coal for a distance of twenty-three inches back from the face of the coal and for twenty feet along the vein. Notwithstanding the failure to receive props, he seated himself at one end of this coal and began cutting through. The evidence showed that when coal is prepared in this way, the method pursued to

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get it down is to cut through the vein and then pry it loose from the wall or ceiling to which it hangs; that while there was danger of the coal falling on account of a lack of props, it was not so openly dangerous as to threaten immediate danger so that no reasonable man would have attempted to work there. *Held*, that the question of contributory negligence was for the jury.

2. ———: ———: ———. Since the suit is on the failure to furnish props as required by the statute, plaintiff ought not to be denied recovery as a matter of law, unless the danger of the situation was so apparent and imminent that plaintiff's placing himself therein would amount to self-inflicted injury. He ought not to be denied recovery merely on a showing that there was some risk attending the further prosecution of the work, and that he assumed that risk.
3. ———: Pleading. It is immaterial whether defendant pleaded contributory negligence or not when the proof offered to sustain plaintiff's cause of action contains and reveals the alleged negligence relied upon by defendant as contributory. In such case defendant is entitled to have the law of contributory negligence applied whether it was pleaded or not.
4. EVIDENCE: Objection to Testimony. Unless an objection to testimony offered or to a question asked specifies a valid ground therefor, the overruling of such objection will not constitute reversible error.
5. ———: Admissions. Where witnesses testify that plaintiff shortly after his injury made statements tending to show that he was guilty of contributory negligence, and plaintiff does not deny them, the fact that he made such statements is to be taken as true. But plaintiff is not to be conclusively bound by them where they were not statements of a fact but rather conclusions of law and the contention that they defeat a recovery rests upon an inference to be drawn from them.

Appeal from Linn Circuit Court.—*Hon. Fred Lamb*,  
Judge.

**AFFIRMED.**

*C. M. Kendrick, A. W. Mullins and H. J. West*  
for appellant.

*Burns, Burns & Burns and J. M. Davis & Son*  
for respondent.

TRIMBLE, J.—Plaintiff was a miner at work in defendant's coal mine. While so engaged he was injured by a fall of coal upon his leg. He brought suit to recover damages alleging that his injury was caused by the defendant's failure to furnish props when requested, as it is required to do by section 8473, Revised Statutes 1909. He recovered judgment, and defendant has appealed complaining of a number of alleged errors.

Defendant's chief point is that its demurrer should have been sustained for the reason that the evidence conclusively shows plaintiff to have been guilty of contributory negligence. It is immaterial whether defendant's answer pleaded contributory negligence or was merely an allegation denying plaintiff's cause of action. Plaintiff claims it was only the latter. But since the alleged negligence of plaintiff relied upon by defendant to relieve it of liability, if shown at all, is revealed by plaintiff's own evidence, defendant is entitled to receive the benefit of such a defense regardless of whether or not it is pleaded in the answer. [Ramp v. Metropolitan St. Ry. Co., 133 Mo. App. 700, 1. c. 702; Cain v. Wintersteen, 144 Mo. App. 1, 1. c. 5.]

A certain segment of the face of the coal was assigned to plaintiff as his "room" or working place. In it he was in full charge and control. No one worked or had authority in there except himself. Plaintiff had mined under and removed the dirt from beneath the vein of coal for a distance of twenty-three inches back from the face of the coal and for a distance of twenty feet along the vein. Defendant's charge of negligence, which it claims is sufficient to defeat recovery, is that plaintiff then seated himself at one end of this overhanging ledge of coal and began cutting through the vein thus causing the coal to fall upon him. But the danger from the fall of coal was not so patent and imminent as the above statement would seem to indicate. The evidence shows that when a

course of coal has been prepared or exposed in this way, the method pursued to get it down is to cut through the vein at one end and *then pry it loose* from the wall or ceiling to which it clings. The evidence, viewed in the light most favorable to plaintiff, which we must do before saying as matter of law that his negligence precludes his recovery, tends to show that while there was danger on account of a lack of props, yet it was not so openly dangerous as to threaten immediate injury so that no reasonable man would have attempted to work there. In such case the question of plaintiff's right to recover and of his contributory negligence should be left to the jury. [Hamman v. Central Coal and Coke Co., 156 Mo. 232; McKinnon v. Western Coal etc. Co., 120 Mo. App. 148, l. c. 162; Adams v. Kansas etc. Coal Co., 85 Mo. App. 486.] In addition to this, since the suit is on a cause of action for failure to furnish props as required by a statute it will not do to apply the rules of contributory negligence or assumption of risk with the same strictness as in actions for common-law negligence. This would in effect nullify the statute. Unless, therefore, the danger was so apparent and imminent that plaintiff's placing himself therein would amount to self-inflicted injury, he ought not to be denied recovery merely on a showing that there was some risk attending the further prosecution of the work, and that he assumed that risk. There was proof that he asked for props on the 7th and again on the morning of the 8th and went to the place where the props were accustomed to be delivered but they were not there; that it usually took from an hour and a half to two hours to furnish props after demanding them; that they were not furnished and that he was hurt about two hours after he had made his *second* request for props. It is true defendant's witness says he made no request for props but as to which one was telling the truth was for the jury to determine. There was, therefore, substantial

testimony to support the verdict and we are not justified in holding that plaintiff failed to make out a case.

It is next insisted that error was committed in allowing plaintiff to answer the following question: "Did you at the time (when plaintiff was cutting the vein) as an experienced miner have any reason to apprehend immediate danger of the coal falling?" The only objection made to the question was that it was leading. The question was not subject to that fault, and if the question was open to any other objection it was not made. Consequently, reversible error cannot be predicated upon the court's action in overruling the objection.

The same may be said concerning the objection to the question asked of the plaintiff as to whether he had any warning of any kind that the coal was going to fall. The objection was that defendant was not charged with the duty of giving any warning and that the question could not possibly be material in the case. This amounted to no objection since the question was not asked for the purpose of showing a duty devolving upon defendant to warn plaintiff but to show that plaintiff did not know that the fall was imminent and on this feature the question was not wholly immaterial.

The defendant introduced witnesses who testified that immediately after the injury plaintiff said it (the injury) was his own fault; that it was a foolish thing for him to go to cutting through the vein with the coal in the situation it was and that he had not struck but two or three blows until it all fell and broke his leg. The plaintiff did not go upon the stand and deny having made these statements. Having failed to deny them defendant says they must be accepted as true. Doubtless the fact that he made the statements is true. [Payne v. Chicago and Alton Ry., 136 Mo. 562, l. c. 594.] But the question is, must the plaintiff be conclusively bound by them? The statements of plaintiff testified to by the witnesses were not admissions of a

*fact* but were admissions of a *conclusion of law* and defendant's contention that they conclusively bind plaintiff rests upon a conclusion or inference to be drawn from them. In the light of the subsequent fall of the coal, plaintiff may have felt that he was blame-worthy to some extent in continuing to work in that situation. But the question whether he was entitled to recover is not whether there was some risk or danger attending the prosecution of his work, but whether it was so patent and imminent that no reasonable man would have undertaken it. The statements plaintiff made did not go to that extent. His statements were admissible against him but, in this particular kind of a case which rests upon a failure to obey the statute requiring props to be furnished, these statements amounted only to circumstances which the jury could consider in determining whether the danger was so great and obvious as to bar plaintiff of recovery. The inferences to be drawn from those statements were for the jury. The statements did not support a conclusive inference that the danger was so great.

Complaint is made of plaintiff's instructions, but the objections to them are not tenable. The instructions are fully authorized by the cases of *Wojtilak v. Kansas etc. Coal Co.*, 188 Mo. 260, and *McKinnon v. Western Coal and Mining Co.*, 120 Mo. App. 148, l. c. 163, and *Western Coal Co. v. Beaver*, 192 Ill. 335, which last case is on a statute of which ours is a rescript.

Finding no error in the record the judgment must be affirmed. It is so ordered. All concur.

EMMA E. BOYNTON, Respondent, v. J. R. BOYNTON et al., Appellants.

Kansas City Court of Appeals, December 21, 1914.

1. **BILL IN EQUITY: Remedy at Law: Cause of Action.** If a petition in equity discloses that the plaintiff has an adequate remedy at law, no cause of action is stated in equity.
2. ———: **Judgment: Satisfaction: Fraud: Legal Remedies.** A petition in equity was founded upon allegations that the plaintiff had entered satisfaction of a judgment obtained against defendants therein through the fraud of defendants. It was held that plaintiff had adequate legal remedies by motion in the same case to cancel the satisfaction; or, by an action on the judgment and the petition in equity should be dismissed.
3. ———: **Motion: Audita Querela: Trial by Jury.** A motion in the same case to cancel satisfaction of a judgment obtained by fraud has practically superseded the old writ audita querela. The motion, if presenting matter for contested facts, should be tried with a jury.
4. ———: **Audita Querela: A Legal Remedy.** If an independent action through audita querela be resorted to, to set aside an entry of satisfaction of a judgment as having been procured by fraud, it is a legal and not an equitable remedy.
5. ———: **Improper Joinder: Waiver.** If two counts in equity to cancel an entry of satisfaction of a judgment on account of fraud be joined with a count at law to recover the amount of the judgment and the defendants proceed to trial before the court (waiving a jury) on all three counts without objection, they waive the irregularity.
6. ———: **Action on Judgment: Fraud: Practice: Pleading.** Where an entry of satisfaction of a judgment has been procured by fraud, and the plaintiff desires to pursue the course of bringing an action on the judgment, he may bring such action, when the defendant should plead the satisfaction as matter of defense, and then plaintiff should set up the fraud in avoidance, by reply.

Appeal from Randolph Circuit Court.—*Hon. A. H. Waller*, Judge.



**AFFIRMED.**

*B. R. Dysart and Hunter & Chamier* for appellants.

*B. E. Cowherd and A. J. Quayle* for respondent

ELLISON, P. J.—Plaintiff was divorced from her husband Ira T. Boynton, who is a son of defendants and she recovered a judgment for \$1500 against defendants for alienating his affection for her. About half of this judgment appears to have been paid. Afterwards she entered satisfaction for the balance, being induced to do so, as she charges, by her former husband (in fraudulent conspiracy with defendants) on his promise to remarry her. Her action is stated in a petition containing three counts, two in equity to set aside the release of the judgment, on account of this fraud of defendants and for want of consideration, and the third, a case at law to recover the sum due on the judgment. The trial court decreed that the release be set aside and it also rendered judgment on the third count for the balance due on the judgment.

Defendant now contends that the first and second counts did not plead facts sufficient to constitute a cause of action in equity, in that neither negated a remedy at law; and further that in point of fact, conceding the release was obtained by fraud, those counts showed affirmatively that plaintiff had an adequate remedy at law. The law side of the court is, ordinarily, the proper tribunal for the administration of justice. Hence the rule is that the petition, in order to state a case in equity, must disclose a state of facts which show that full and adequate justice cannot be had at law. [Somerville v. Hellman, 210 Mo. 567.]

That an ample remedy at law existed for plaintiff's complaint, we have no doubt. The mere satisfaction or release of a judgment is no more than a receipt

as evidence of payment, and, "if made bona fide and correctly, forever discharges and releases the judgment." But, "as between the parties, if made unauthorizedly or by mistake, it may be cancelled or set aside on motion." [Cohen v. Camp, 46 Mo. 479.] In section 1016 of 2 Black on Judgments, it is stated that, while summary proceedings are available to set aside a fraudulent or mistaken entry or satisfaction, yet if there is conflicting evidence on material questions of fact, the proper mode of redress would not be upon motion *sustained by ex parte affidavits*, but "the party should be put to a regular action," citing Chapman v. Blakeman, 31 Kansas, 684, where the remedy pursued was a motion grounded on fraud, on which the parties were heard as upon an original action.

That the remedy by regular trial, as in *audita querela*, may be had on a simple motion, is stated in Longworth v. Screven, 2 Hill (S. C. Law) 298. In McDonald v. Falvey, 18 Wis. 599, the court said that "since the motion has taken the place of *audita querela* altogether, it would seem that the same mode of trial ought still to prevail; and such we find to be the practice. An issue is made and sent to a jury to be tried, like other cases of fact." And that, as we have seen, was the mode followed in Chapman v. Blakeman, *supra*.

In an early case in Massachusetts (Lovejoy v. Webber, 10 Mass. 101) the remedy sought was through the writ *audita querela* and the point was made that it could not be sustained on the ground that the party should have proceeded by motion; the court said that "*audita querela*, being at common law, is not taken away or abolished by a concurrent remedy. . . . It is a concurrent remedy with others; as in cases where redress may be had by summary proceedings on motion." . . . "The remedy is to be determined by the rules and precedents at common law." And the action was upheld, there being material disputed facts

to be ascertained. It is not said in that case whether if the proceeding had been by motion, a regular trial would have been had on the motion, or whether the parties would have been remitted to a separate and independent action. The latter course seems to be the view expressed in *Wicket v. Cremer*, 1 Lord Raymond 439, and *Baker v. Ridgway*, 2 Bing. 42, 47.

It will be seen that the result to be deduced from these cases, at least in this country, is that an independent action of *audita querela* is rarely used, since the same relief can be had on motion. The motion is filed as if in, or as a subsequent part of, the original case. If the motion brings on a contest involving material conflict in testimony, it ought not to be heard by the court summarily, on *ex parte* affidavits produced by the respective parties. But issue should be joined on the motion and the matter regularly tried with a jury.

We do not say the court may not order that an independent action (which would be no less than a complaint *audita querela*) be instituted and submitted to a jury. But *either* of these remedies would be at law. 3 Blackstone, p. 406, says the writ *audita querela* lies "in the nature of a bill in equity," yet it is a common-law writ governed by rules and practice at law.

Having determined that the first and second counts show that plaintiff's remedy is at law and that a bill in equity would not lie, we must consider how the case stands on the third count, a straight action at law on a judgment. Defendant contends that it being an action at law, *ex contractu*, it could not be properly joined in the same petition with counts *ex delicto*; and that two counts being in equity and one at law, there should have been separate trials, by jury, if demanded on the law count, and by the court on the others. But defendant made no objection to the joinder, nor did they ask a separate trial of the law count. Their ob-

jection in a motion in arrest came too late, for the matter was not of vital consequence and was such irregularity as might be waived in the trial.

The third count, being an action on a judgment, may be maintained notwithstanding it appears to be satisfied by entry on the margin of the record, if such satisfaction was procured by fraud. [Cohen v. Camp, 46 Mo. 179.] Regularly plaintiff could well bring her action on the judgment and if defendant wished to rely upon a release or satisfaction, it was a matter of defense for him to plead. Plaintiff could then have laid the ground for avoiding the satisfaction by pleading in her reply that it was obtained by fraud. Instead of this, we have a suit on the judgment, joined in the same petition, with a bill to cancel the satisfaction of the judgment for fraud which does not state a cause of action, tried as one case. The result of all this, we think, is, in practical effect, to leave a case stated on the judgment together with affirmative allegations in the petition that an entry of satisfaction had been obtained through defendants' fraud. Thus taking the affirmative, instead of waiting for defendant to plead the release and then replying with the charge of fraud. Defendant's answer does not distinguish between the counts of the petition, but, after admitting that satisfaction was entered, is only a general denial. Accepting this as a denial of fraud in procuring the satisfaction, we proceed to consider whether the trial was properly conducted.

The only objection made under defendants' points as set forth in their brief, is that the court erred in admitting "conversations and agreements between plaintiff and Ira T. Boynton not in the presence of defendants and of which they had no knowledge or information." Defendants' abstract of the record shows that defendants objected and excepted to the ruling of the court. But plaintiff challenged the correctness of defendants' abstract and printed and filed one in which

it appears that no exception was taken, and defendants not having disputed this by asking that the original record be brought up we must accept it as true. [Sec. 2048, R. S. 1909.]

Under the 9th and 10th points of objection to the judgment, it is suggested, without elaboration, that there was a failure of proof of a conspiracy between defendants and Ira T. Boynton. We do not agree to this. We think it appears that the latter party falsely and fraudulently promised to remarry plaintiff if she would satisfy the judgment and that his father (the defendant J. R. Boynton) knew of it before as well as afterwards.

However, the foregoing is of no practical importance, in the state of the record. It is manifest from the entire record, that there was no consideration for the alleged satisfaction of the judgment. The sum of the whole matter is, that we are asked to sustain an entry of satisfaction of the balance on a judgment for which plaintiff has not received a penny.

The judgment should be affirmed. All concur.

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MARY IBA, Respondent, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, and THOMAS O. PHELAN, Appellants.

Kansas City Court of Appeals, January 11, 1915.

1. **NEGLIGENCE: Railroads: Death: Boarding Trains.** The plaintiff, widow of Frederick Iba, deceased, sued to recover damages from the defendants for the death of her husband. The deceased attempted to board a train for which had purchased a ticket. He succeeded in placing one foot on the lowest step of the car and had a hold of the hand railing, when the conductor pulled on him, and he hit against a freight truck standing close, lost his hold, fell under the car, and was killed. *Held*, that there was no reversible error in the record and the judgment for \$5000 will be affirmed.

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2. ———: ———: ———. Where one starts to board a train, for which he has purchased a ticket, and before it is signalled to start, he is acting within the scope of his rights as invitee, and the conductor has no right to eject him, especially after the train starts. When such ejection is the proximate cause of his death or injury, the conductor is liable to respond in damages and also the railroad company because of its responsibility for his act under the rule of respondeat superior.

Appeal from Buchanan Circuit Court.—*Hon. Wm. D. Rusk*, Judge.

AFFIRMED.

*Culver, Phillip & Spencer* and *O. M. Spencer* for appellants.

(1) The Supreme Court has superintending control over the Kansas City Court of Appeals where it has acted beyond or in excess of its power and jurisdiction. *State ex rel. v. Broadus*, 245 Mo. 123. (2) An appellate court in this State is limited to the errors assigned in motion for new trial filed within the time allowed by law and an attempt of an appellate court to investigate a question suggested otherwise is beyond its power and jurisdiction. Revised Statutes 1909, sec. 2081; *King v. Gilson*, 206 Mo. 264, 280; *Rodan v. Transit Co.*, 207 Mo. 392, 406; *Winn v. Grier*, 217 Mo. 461; *St. Louis v. Lawton*, 189 Mo. 474; *Williams v. Railroad*, 156 Mo. App. 675; *Fusselman v. Railroad*, 139 Mo. App. 198; *Brenton v. Thomas*, 138 Mo. App. 64; *Stauffer v. Railroad*, 243 Mo. 305; *Ewart v. Peniston*, 233 Mo. 695; *Sterrett v. Railroad*, 225 Mo. 99; *Street v. School District*, 221 Mo. 633; *Lynch v. Railroad*, 208 Mo. 42; *Bank v. Porter*, 148 Mo. 176.

*C. C. Crow* and *John S. Boyer* for respondent.

JOHNSON, J.—Plaintiff, the widow of Frederick Iba, deceased, brought suit in the circuit court of Buch-

anan county, December 14, 1909, against the defendant railroad company and Thomas Phelan to recover damages for the death of her husband which she alleges was caused by the joint negligence of the defendants. Iba was killed October 13, 1909, at the station of Easton, while in the act of boarding a passenger train as a passenger. Plaintiff alleges "that her said husband, Frederick B. Iba, had boarded the said train and was standing upon the steps of the passenger coach of said train, holding with his hand to the handrail of said coach. That at said time the defendant Thomas Phelan, conductor of said train, was standing on the depot platform at said place and had caused the said train to begin to move and that while plaintiff's said husband was standing on the lower step of the said passenger coach, the conductor called up to him in a loud voice to get off the train, and moved toward this plaintiff's said husband and took hold of him and pulled him backward so as to cause his body to sway backward off of the steps of the said coach and that the said conductor pulled this plaintiff's husband backward from the said train and interfered with, and prevented this plaintiff's said husband from going up the steps of the said coach and inside of the said train, by his words and acts aforesaid. That the said defendant Thomas Phelan, conductor of said train, also pushed this plaintiff's said husband forward into the steps of said train and caused his body to sway forward and then backward, while the plaintiff's said husband was in the position aforesaid. That immediately thereafter the said defendant, Thomas Phelan, conductor of said train, and agent, servant and employee of defendant as above stated, pulled this plaintiff's husband backward and forward as above stated and caused his body to sway forward and backward while in the position above stated; that the body of this plaintiff's said husband struck one end of the large freight truck above mentioned, while standing in the place and position

above described, and that by striking the end of the said truck the body of this plaintiff's said husband was again knocked forward and caused to sway and strike the said truck again, and thereby and on account of the actions of the said conductor, and the defendant, Chicago, Burlington & Quincy Railroad Company, and on account of their joint carelessness and negligence as herein specifically stated and detailed, this plaintiff's said husband was caused to lose his balance upon the steps of the said train between the said depot platform and the said train, upon the ground and under the wheels of said train, where this plaintiff's said husband was dragged and crushed under the wheels of the said train, and on said railroad tracks, from which he instantly died."

The defendant railroad company filed a petition and bond to remove the case to the United States court on the ground that said defendant was an Illinois corporation; that plaintiff and Phelan were citizens of Missouri and that the cause of action pleaded in the petition being founded on section 2864, Revised Statutes 1899 (5425, R. S. 1909) was separable and not joint. The circuit court approved the bond and made an order transferring the cause, but the Supreme Court reviewed this ruling on *certiorari*, and quashed the order on the ground that the petition stated "but one cause of action and that is against both defendants and it is under sections 2865 and 2866, Revised Statutes 1899, now sections 5426 and 5427, Revised Statutes 1909." [State ex rel. v. Mosman, 231 Mo. 474.] Pursuant to this decision the circuit court of Buchanan county resumed jurisdiction over the cause and tried it in February, 1911, upon the issues raised by the petition and answers and the jury returned a verdict for plaintiff assessing her damages at \$5000.

In due time defendants filed their motion for a new trial and at the same term but after the time had



expired for filing a statutory motion for a new trial, defendants filed a paper called "a suggestion to the court" in which they alleged that Albert Rise, a witness introduced by plaintiff, had given perjured testimony, and invoked the exercise of the inherent power of the court to remedy the injustice perpetrated by such means. At about the same time a criminal proceeding was instituted by the State against Rise on a charge of perjury. The circuit court did not dispose of the motion for a new trial until after the trial of the criminal case which ended in the acquittal of the accused. A new trial then was refused and in passing on the suggestions addressed by defendants to the judicial conscience, the court made a statement of its views which was taken down by the stenographer and afterward preserved in the record. These views were of a nature to raise a serious question concerning the propriety of the court's ruling. Defendants appealed to this court and presented for our decision the following questions:

First: "The order removing this cause to the Federal court not having been set aside by the trial court, it had no jurisdiction to try the case."

Second: "The petition and bond for removal of the defendant railroad company being in form and the case being removable, the trial court lost jurisdiction when said petition and bond were filed."

Third: "Defendants' demurrers at the close of all the testimony should have been given."

Fourth: "The court committed error in instructing the jury that 'defendant company, its agents, servants, and employees, owed deceased the highest degree of care such as would be exercised by practical and skillful railroad employees under like circumstances.'"

Fifth: "The court should have granted the defendants a new trial because of perjury committed by plaintiff's witness Albert Rise."

We found the fifth question difficult to solve but at last held that a new trial should have been granted on the ground that since it appeared in the record that the trial court was convinced of the perjury of Rise and that the verdict was against the weight of the evidence, its refusal to give defendants a new trial out of deference to the finding of the jury in the criminal case was an error which should be reviewed and corrected on appeal. We refer to the report of that decision for a full statement of the case and the reasons which led to our final conclusion that reversible error had been committed. [Iba v. Railroad, 172 Mo. App. 141.]

Further we held that the decision of the Supreme Court on the issue of the removal of the cause to the Federal court was final and conclusive and that "it was not necessary for the trial court to first set aside its removal order before trying the case since the Supreme Court had effectually disposed of it." We are bound to follow the decision of the Supreme Court that the cause pleaded in the petition is under sections 5426 and 5427, Revised Statutes 1909, is, therefore, joint and that no ground exists for removal (See also *Railway v. Schwyhart*, 227 U. S. 184, affirming *Schwychart v. Barrett*, 145 Mo. App. 332), and shall not again refer to the first two assignments of error. We did not discuss the demurrer to the evidence and the alleged error in plaintiff's first instruction, for the reason that while they were not formally abandoned, they were treated by both parties as negligible questions, and the issue of Rise's alleged perjury and the trial court's treatment of it became the sole subject of argumentative controversy between the parties.

Following the announcement of our decision the Supreme Court, at the relation of plaintiff, reviewed the case on *certiorari* and held, in substance, that the trial court's ruling on the weight of the evidence, under the facts disclosed, was not reversible error. Reference to that opinion, which is reported in Vol. 256 of the

Missouri Reports at page 644, will disclose the reasons for the decision that our opinion was in conflict with prior cases of the Supreme Court and that the judgment based thereon should be set aside. The command was that the judgment rendered in this court "be quashed and for naught held and that said cause should be remanded to that court to be retried by it and determined in conformity with the views announced herein."

The opinion of the Supreme Court does not refer to any other assignment of error than that relating to the ruling on the weight of the evidence, and we sanction the contention of defendants that the mandate requires us to hear the cause on the questions of the sufficiency of the evidence of plaintiff to take the case to the jury and of the alleged error in the first instruction given at the request of plaintiff.

Facts pertinent to the proper consideration of these points thus may be stated: Iba, who was sixty-eight years old, was actively engaged in the grain and stock shipping business at the town of Easton, twelve miles east of St. Joseph, on defendant's railroad. He was intemperate in the use of intoxicants but at the time in question was not noticeably under the influence of liquor. He intended going to St. Joseph that afternoon on the passenger train and bought a ticket which entitled him to become a passenger thereon. The train stopped, as usual, at the station platform for the reception and discharge of passengers and there is no suggestion in the evidence that it did not remain stationary a reasonable time for the safe egress and ingress of outgoing and incoming passengers. Iba had other business at the station and did not attempt to board the train until just before or just after it started to leave. Plaintiff introduced two witnesses, one of whom was the witness Rise, who testified that just before the conductor Phelan, who was on the platform, gave the signal to start the train, Iba stepped to the

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bottom step of the front entrance of the rear coach and, holding with his left hand to a handhold, paused an instant to respond to a question or salutation, when the train started and the conductor commanded him to alight and then forcibly tried to pull him from the step. There was a loaded truck standing on the platform close to the train, a short distance ahead and the struggle between the conductor and Iba lasted until the former, who was still on the platform, was compelled to desist in order to escape collision with the truck. Iba remained on the step clinging to the handhold, but his body protruded outward far enough to collide with the truck and he was thrown off the step and killed.

The testimony of these two witnesses is corroborated in every detail (with a single exception) by the first two witnesses introduced by defendants. The only substantial difference between these witnesses is that those for defendants state that Iba did not start to board the train until after it had started forward. We quote from the testimony of H. B. Martin, one of defendant's witnesses:

"I could not see the conductor, but I heard him make the remark, 'all aboard,' and the train moved out and Iba could see the coach from looking out of the freight house door, and as quick as he saw the coach move off he came out. I could not say that he run, but it was the next thing to it, when he got to the door he kind of cut angling across to catch up with the train, with the car, and when he caught up with the coach, why he reached out with his left hand, and grabbed what you call the handhold with his left hand, and he managed to get up with his left foot on the lower step; I don't know whether you might call it an awkward position or not, but he was hanging there all right enough.

"Q. While you are on that will you describe his position to the jury, how he was hanging, you say he

was hanging there? A. He was hold of the handle bar, I suppose everybody knows how it is to catch hold of a train when it is moving that way, it is mighty hard to balance yourself.

"Q. Where was his feet? A. His left foot was on the lower step of the steps.

"Q. Where was his other foot? A. It was hanging down between the steps and the platform.

"Q. Could you tell what, if anything he was trying to do? A. I suppose he was trying to get on the train, of course.

"Q. Now go ahead and tell what happened. A. Well, after he was on there, the conductor happened to notice it, I suppose, and the conductor was standing between him and the truck that was on the platform there, he was— . . .

"Q. State what you did see. A. I saw, as quick as the conductor saw him, he turned around and approached, run over to Mr. Iba and when he got within a reasonable distance, or reaching distance, he just made him, and said to him he says, 'what are you doing on there.' He says, 'get off,' and told him to get off and the second time he hollered to get off, and he grabbed hold of his right arm, and looked like he was trying to pull Mr. Iba off, for what object I don't know. Of course that was his business; he tried to pull him off all right. After that he could not get him off, and he got within two or three feet of the truck, and turned him loose and broke his hold some, why, after he got loose he made a move just like a man would if he was going to run against him or such as that, pushed him on the flat of his back, or on his side, to push him up the steps but whether or not he pushed him I could not tell. Had to look mighty fast to keep up with him, and the conductor jumped back and kept from hitting that truck, and as quick as the conductor jumped back Iba was coming into contact with that truck, and it hit him somewhere along in the side,

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and when it hit him it jolted him back with his back against the side of the coach and swung his right arm around against the back of the coach, so you could hear distinctly the slap of the hand on the back of the coach, and when he swung back again so he come—come back again he had passed the truck two-thirds of the distance and when he come around again he just hit it kind of a glancing lick.

“ . . . tell the jury what his position was when the conductor started towards him. A. I could not call it a dangerous position so far as that was concerned, but it was awkward.

“Q. You are not allowed to say that. Tell the jury what his position was. A. He was standing there hanging, ahold with his left hand to that rod and standing on the lower step with his left foot on that step, and the right foot hanging down by the side of it.

“Q. Can you tell whether he was aiming to get on or off the train? A. He was undoubtedly trying to get on the train. He was doing that all right.

“Q. How long was he in that position, trying to get on the train? A. I really could not say. I don't know how I could answer that because just in a moment everything was over. I think though he went about ten or twelve feet before the conductor noticed him, and as quick as the conductor noticed him he run towards him and told him—asked what he was doing up there, and told him to get off, twice, and the second time he told him, grabbed hold of him and tried to knock him off—tried to put him off, I mean.”

On cross-examination:

“Q. What was Mr. Iba doing when the conductor took hold of him? A. Why, he was on the—having hold of that handle bar, and standing on the lower step of the train.

“Q. Was he getting on the train? A. He was trying to, I suppose, yes.

"Q. The train was carrying his whole weight, wasn't it? A. Yes.

"Q. He did not have his right foot on the platform, did he? A. Not according—not the way I saw it.

"Q. And he was then riding on the train, wasn't he? A. Well, you might call it that.

"Q. Now how fast was that train going? A. Oh, about as fast as it generally goes when it leaves the depot. It did not go any faster than usual, or any slower, I don't suppose.

"Q. We don't know how fast that is. It was moving very slow, wasn't it, just starting up? A. Yes, sir.

"Q. And he was riding on it? A. Well, of course.

"Q. He was riding on it? A. Yes.

"Q. Then the conductor took hold of him? A. Yes, sir.

"Q. And tried to pull him, did he? A. Yes, sir; he tried to pull him off. . . .

"Q. He hung onto him? A. Yes, sir.

"Q. There would not have been any trouble if the conductor had not taken hold of him, and hung onto him? A. I hate to give my judgment on that, but I don't think there would be."

On re-direct:

"Q. At the time the conductor started towards Mr. Iba to take hold of him, what was Mr. Iba's position as to whether it was erect, up straight, or whether he was swinging? A. Well, you could not say he was swinging; he was standing with his left foot on the step, and having a firm hold on the—

"Q. What position was his body? A. Upright.

"Q. Perfectly straight? A. Yes, sir.

"Q. Where was his right foot? A. His right foot was hanging between the step and the platform; he was just standing on his left leg.

"Q. Standing on his left foot? A. Yes, sir.

“Q. With his right foot swinging? A. Yes, sir; swinging down betwixt the steps and the platform.”

To the same effect is the testimony of W. R. Deakins, the other witness for defendant we have mentioned.

The conductor and other witnesses testified that Iba did not try to get on until after the train had started and that without succeeding in obtaining a foothold he was hopping along trying in vain to get on the step when, seeing his predicament, the conductor attempted to grab him and save him from falling between the platform and train. It will be noted that there are three evidentiary versions of the injury, viz., first, that Iba, intending to become a passenger, started to board the train while it was still standing at the station for passengers to get on, and that he had attained a position of safety on the step when the conductor assaulted him and forced him into a position of peril. Second, that he did not attempt to board the train until after it had started but succeeded in attaining a position of safety on the step when he was assaulted and thereby imperilled. And, third, that he did not try to board the train until it had acquired a dangerous speed, did not reach a position of safety and was not assaulted by the conductor whose effort towards him was put forth under the humane impulse of saving him from death or serious injury.

Each of these versions finds substantial support in the evidence and since none of them appears opposed to physical fact or law, it was for the jury to decide which group of witnesses should be believed. Under the first of these evidentiary hypotheses, there can be no question of the liability of defendants. By stopping its passenger train at the station for the reception of passengers, defendant company extended an implied invitation to Iba, who had provided himself with a ticket entitling him to ride on that train, to become a passenger thereon. That invitation continued



as long as the train stood there and until it was closed by the conductor's signal to start. If Iba, during that period, started to board it, he was acting within the scope of his rights as an invitee, and the conductor had no right to attempt to eject him, especially after the train had started. Clearly such wrong was the proximate cause of his death and the conductor is liable to respond in damages because he was the wrongdoer, and the railroad company because of its responsibility for his act under the rule of *respondeat superior*. The act did not consist of a negligent operation of the train, but of an unjustifiable attempt to eject a passenger from a moving train on which he had rightfully attained the status of a passenger. [State ex rel. v. Mosman, supra, l. c. 490, et seq.]

The liability of defendants seems no less clear and certain under the second hypothesis. Concede that the invitation had been closed and that it was negligence for Iba to attempt to board the train, such negligence was the remote, not the proximate cause of the injury. It was not a positive wrong for him to try to catch a moving train and if he succeeded and placed himself thereon in a position of relative safety, he was no outlaw nor wrongdoer, but became entitled to ride on the train, since he possessed a ticket which so qualified him; and, having reached the status of a passenger, defendant railroad and its servants owed him the highest degree of care to protect him from injury. Instead of giving him such protection the conductor tried to force him from the moving train and thereby converted his position of relative safety into one of the greatest danger. It is too plain for argument that such act was the proximate cause of the injury. The trial court could not well do otherwise than overrule the demurrer to the evidence, since plaintiff was entitled to go to the jury on either of the first two hypotheses.

We have said enough to show that there is no merit in the criticism of plaintiff's first instruction, since,

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under the common law, a carrier is required to exercise the highest degree of care towards a passenger. The instruction is not in conflict with defendants' eighth instruction which is bottomed on the evidence of the conductor and negatives the idea that Iba had become a passenger. Until he became a passenger defendant railroad company and its servants would owe him no higher duty than that of reasonable care.

There is no reversible error in the record and the judgment will be affirmed. It is so ordered.

All concur.



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By JOHN M. CLEARY.

(Cases are inserted in the order received by the publisher.)

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**ANIMALS.**

1. **Dogs: Property: Right to Kill Dog.** Dogs are property, and no one has a right to kill a dog belonging to another, although found in the slayer's premises, except for just cause. *Rudiclle v. Barr*, 475.
2. **Same: Right to Kill Dog Chasing Sheep: Statute.** Under Sec. 856, R. S. 1909, one may kill a dog not in the owner's inclosure, if discovered in the act of killing, wounding, or chasing sheep, or under such circumstances as to satisfactorily show that it had been recently engaged in killing or chasing sheep or other domestic animals. *Ib.*
3. **Same: Sufficiency of Evidence.** In an action for shooting plaintiff's dogs while on defendant's premises, *held*, under the evidence, that whether the dogs were, or had been, just prior to the shooting, chasing defendant's sheep, so as to justify the shooting, under Sec. 856, R. S. 1909, was a question for the jury. *Ib.*
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2. **Verdict Against Weight of Evidence: Bias and Prejudice: Reversal.** Where from the overwhelming weight of the evidence it can only be concluded that passion and prejudice controlled the jury and where the amount allowed shows passion and prejudice, the appellate court should reverse the judgment and remand the case for a new trial instead of reducing the verdict. *Ib.*
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**APPEALS.** See **Appeal and Error.**

**APPELLATE PRACTICE.** See **Jurisdiction; New Trial.**

1. **Conclusiveness of Findings.** In an action at law, tried to the court, where no findings of fact are made and no declarations of law are requested or given, the judgment will be affirmed, unless it is so manifestly erroneous that it cannot be sustained on any theory supported by the evidence, or unless the trial court committed prejudicial error in its rulings. *Martin v. Printz*, 52.
2. **Harmless Error.** The giving of erroneous instructions and the erroneous admission of evidence is innocuous, where, under the evidence, the court should have directed a verdict for the party in whose favor such errors were committed. *LaRue v. Kempf*, 57.
3. **Motion for New Trial: Prerequisites to Review.** A bill of exceptions is the sole repository of a motion for a new trial, and unless it is so preserved, the appellate court cannot determine what was prayed for therein. *Wonderly v. Haynes*, 75.
4. **Exclusion of Evidence: Harmless Error.** The improper exclusion, in an action for personal injuries, of photographs of the place of injury was harmless, where the facts and location of the place were so thoroughly described in evidence that the jury were apprised of all the facts they could have discovered from the photographs. *Lauff v. Kennard, etc. Co.*, 123.
5. **Conclusiveness of Findings.** In an action at law tried to the court, the question of where lies the preponderance of the evidence is for the sole determination of the trial court, and its finding is conclusive, on appeal, if sustained by substantial evidence. *Jennemann v. Bucher*, 179.
6. **Trial Practice: Leading Questions: Review.** The trial court may, in its discretion, allow leading questions to be propounded to a witness, and such discretion will not be interfered with,

## APPELLATE PRACTICE—Continued.

on appeal, unless it has been flagrantly abused and the party objecting has suffered injury therefrom. *Ib.*

7. **Exclusion of Evidence: Review.** In order to warrant the review, on appeal, of a ruling by the trial court excluding evidence, such evidence, or its substance, must be preserved in the record. *Ib.*
8. **Presumption of Correct Action by Trial Court.** In the absence of a showing to the contrary, the presumption is always in favor of correct action on the part of the trial court. *Ib.*
9. **Conclusiveness of Finding: Equity Suits.** The appellate court is not bound by the finding of the trial court in an equity suit, but may draw its own conclusion from the facts in evidence as presented by the record; but where the evidence is conflicting, and there is substantial evidence to support the finding, the appellate court will defer very greatly to the finding of the trial court. *Troll, Admr. v. Daugherty & Bush R. E. Co., 196.*
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11. **Instructions: Failure to Limit Punitive Damages: Not Error, When.** Where a verdict was for a less amount than that claimed in the petition, no reversible error was committed because an instruction for plaintiff did not limit the amount of punitive damages to the amount claimed in the petition. *Cook v. Lusk et al., 288.*
12. **Harmless Error: Improper Evidence: Incidentally Admitted: Stricken Out.** In an action against a master by a servant for personal injuries it is not ground for reversal because evidence that defendant held liability insurance and would not be liable ultimately to pay was incidentally admitted into the case, where it was properly stricken out on objection being made. *Baxter v. Campbell Lbr. Co., 352.*
13. **Assuming too Great Burden: Evidence: Effect.** Where plaintiff is only required to make out a prima-facie case, which he does, the fact that he undertook to do more and thereby elicited some incompetent evidence, does not affect the merits of the case. *Adkinson et al. v. McKay, 391.*
14. **Evidence: Incompetent: Harmless Admission.** The fact that the bookkeeper of the company holding a note testified that he did not receive payments in question personally at all times or at all times personally make book entries concerning same, but supervised same, did not render his testimony as to payments wholly incompetent. *Ib.*
15. **Review: Assignments of Error.** A ruling which is not assigned as error is not properly before the appellate court for consideration, although complaint thereof is made in the written argument filed by appellant. *Rudicile v. Barr, 475.*
16. **Ruling on Demurrer to Evidence: Prerequisite to Review.** A refusal of the trial court to give an instruction in the nature

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of a demurrer to the evidence is not reviewable, unless all the evidence adduced is presented to the appellate court. *McGowan v. Gardner et al.*, 484.

17. **Defects in Pleading: Clerical Error.** A statement in a petition which renders it vulnerable to attack as not stating a cause of action cannot be rendered innocuous, on appeal, by a suggestion that it was a clerical error, since the appellate court must pass upon the petition as it finds it. *Ib.*
18. **Binding Effect of Theory at Trial.** In an action for the purchase price of a chattel, where the case was tried in the trial court on the theory that it belonged to plaintiff, defendant would not be heard to contend, on appeal, that it belonged to another. *Marth v. Wiskerschen*, 515.
19. **Conclusiveness of Findings: Equity Case.** Although findings in an equity case are not binding upon the appellate court, such court ought to give much deference thereto. *Llewellyn v. Butler et al.*, 525.
20. **Municipal Ordinances: Prerequisites to Review.** A municipal ordinance cannot be considered by the appellate court unless it is preserved in the record for review. *Coatsworth Lbr. Co. v. Owen et al.*, 543.
21. **Review: Matters not Embodied in Record.** Whether a bond given in prior litigation was a supersedeas or only a bond for costs, could not be determined, on a subsequent appeal, where the bond was not preserved in the record presented on such subsequent appeal. *Oliver v. Epperson et al.*, 622.
22. **Errors Presumptively Prejudicial.** The broad presumption is, that errors of the trial court are prejudicial, and it devolves upon the person asserting their harmlessness to show such fact affirmatively, otherwise the presumption will prevail; but this rule does not obtain where it affirmatively appears that the error is so inconsequential as not to have prejudiced the party against whom it was committed. *Ferd Bauer E. & C. Co. v. Arctic Ice, etc. Co.*, 664.

**ASSAULT AND BATTERY.** See Instructions.

**ASSUMPTION OF RISKS.** See Master and Servant.

**ATTACHMENTS.**

1. **Bond: Liability of Sureties: Variance in Name in Caption and Condition of Bond.** The first name of the plaintiff was correctly given in the caption of the bond in attachment but incorrectly given in the condition. Where no showing was made that there had ever been any other action in the county by the person named in the condition the defendant in the attachment suit can recover against the sureties on the bond after the attachment is dissolved. *State ex rel. v. Yount et al.*, 258.
2. **Bond: Sureties Liable for What.** After a dissolution of an attachment by judgment for defendant on the merits, the sureties on the attachment bond are liable for the traveling expenses, loss of time, cost of taking depositions and attorney's fees expended in defending the attachment. *Ib.*

**ATTACHMENTS—Continued.**

3. **Same: Conditions: Meaning.** The condition in an attachment bond that the plaintiff would "prosecute her action with effect" names "with success." *Ib.*

**ATTORNEY AND CLIENT.**

1. **Extra Services: Validity of Contract for Additional Compensation.** The contract of an attorney to render professional services for a fixed amount covers all services which are ordinarily or necessarily incident to the proper performance of the duties so undertaken by him, and for such services he can recover no extra compensation; but such a contract does not preclude him from recovering extra compensation for services rendered, with the express or implied consent of the client, which were not contemplated when the contract was made. *Bishop et al. v. Vaughan*, 479.
2. **Same.** Where an attorney agreed to prosecute a claim for a retainer and a certain percentage of the recovery, a subsequent agreement between him and his client, whereby he was to be paid an additional amount for attendance at the taking of depositions in a distant State, which work was not contemplated when the original contract was made, was valid. *Ib.*

**BILLS AND NOTES. See Justices of the Peace; Pleading.**

1. **Variance: Dismissal.** If there is such a discrepancy between the note declared on and the one filed as an exhibit as to not justify it being offered in evidence, then the instrument sued on is not filed as required by Sec. 1844, R. S. 1909, and the defendant may have the cause dismissed. *Firat Natl. Bank v. Stam*, 439.
2. **Indorsement: Formal Not Always Necessary.** A formal indorsement of a note is not in every instance necessary to pass title. And when the uncontradicted testimony shows that plaintiff purchased the note sued on, that he was the owner thereof and that the payee whose name appeared thereon as having endorsed it was a party defendant, who by his default admitted plaintiff's ownership, it cannot be objected that there was no indorsement. *Ib.*
3. **Provisions in for Attorney's Fee.** Where a note provides for a ten per cent attorney's fee, the holder is entitled to judgment for that amount without proving that it is reasonable. *Ib.*

**BROKERS. See Real Estate Brokers.****BURDEN OF PROOF. See Covenants.****CARRIERS OF GOODS.**

1. **Damages to Goods Shipped: Statement.** Action against carrier for damages on account of alleged negligence in handling two cars of watermelons in transit. Statement of case. *Coy v. St. L. etc. R. R. Co.*, 408.
2. **Injuries to Shipment: To Person Accompanying: Transitory Actions.** An action against a carrier for damages to goods



**CARRIERS OF GOODS—Continued.**

shipped and to the person who accompanies them at the time, both grew out of the same tort and are both common-law actions for negligence. They are transitory actions and may be brought wherever the defendant may be found and jurisdiction over it obtained. *Coy v. St. L. etc. R. R. Co.*, 408.

3. **Negligence in Shipment: Law of Place.** In an action against a carrier for negligence, where the negligence complained of occurred in Missouri, the laws of Missouri govern the rights and liabilities of the parties. *Ib.*
4. **Negligence: Injuries to Persons and Property: Splitting Action.** Plaintiff made a shipment of melons on defendant's road, accompanying same. By negligence of defendant plaintiff was injured and the melons damaged. Judgment was had in Arkansas against the carrier for personal injuries. He may not now split his cause of action and maintain an action in Missouri for damages to the melons. *Ib.*

**CARRIERS OF LIVE STOCK.**

1. **Shipments: Interstate Shipments: Interstate Commerce Law.** An interstate shipment is governed by the Interstate Commerce Law and the construction placed thereon by the Federal courts. *Smith et al. v. St. L. etc. Ry. Co.*, 401.
2. **Stipulations in Contract: Binding When.** In a contract for an interstate shipment of live stock a stipulation therein contained that in case of loss of or injury to the live stock the shipper should give notice thereof within one day after delivery to destination before he would be allowed to recover damages, is valid. And a shipper giving notice after the expiration of the time specified is not entitled to recover. *Ib.*

**CARRIERS OF PASSENGERS. See Damages; Instructions.**

1. **Mistreatment by Conductor: Statement.** Action by a lady for damages because of alleged mistreatment by defendant's conductor. Evidence examined and considered sufficient to sustain a finding for plaintiff. *Cook v. Lusk et al.*, 288.
2. **Action Against by Passenger for Mistreatment: Punitive Damages.** A lady passenger, rightfully on a train of defendant, who had given the conductor her ticket and was afterwards forced to pay cash fare by the conductor who used insulting language to her and threatened to put her off the train, was entitled to recover not only actual but punitive damages as well. *Ib.*
3. **Carriers: Passenger: When Relation Begins.** Plaintiff having purchased a ticket presented himself at the steps of the defendant's coach to board the train, exhibiting his ticket. The brakeman denied his right to enter and assaulted him. Plaintiff held a passenger. *Winston v. Lusk et al.*, 381.
4. **Same: Assault on Passenger: Conflicting Evidence: For Jury.** Where there is a conflict of evidence whether the brakeman or the plaintiff passenger was the aggressor in an assault alleged to have been committed by the brakeman upon the passenger, the question was properly submitted to the jury. *Ib.*

## CARRIERS OF PASSENGERS—Continued.

5. **Same: Duty to Passengers: Insurers Against Assault by Employees.** A carrier is liable absolutely as an insurer for the protection of its passengers against assaults and insults at the hands of its servants. *Ib.*
6. **Same: Assault on Passenger by Brakeman: What Not a Defense.** That a brakeman assaulted a passenger, deliberately and without provocation, and merely to feed his personal grudge, does not excuse the carrier from liability on the ground that the brakeman was not acting within the scope of his duty. *Ib.*
7. **Same: Assault by Station Agent: Scope of Employment.** Action by infant for damages on account of an assault committed on him by defendant's ticket agent. Plaintiff purchased a ticket from the agent at defendants' station and was endeavoring to induce agent to return him the proper change when he was assaulted by the agent. The assault was committed while the agent was acting within the scope of his employment and defendant was liable for same. *Bledsoe v. West et al.*, 460.
8. **Same: Passenger: When Relationship Begins: Purchase of Ticket at Station.** Plaintiff presented himself at defendants' depot expecting to take passage on defendant's train due in a short time. He purchased a ticket and was endeavoring to induce agent to give him his change when the agent assaulted him. Plaintiff was a passenger to whom defendant owed the duty to protect him from unlawful assaults by strangers and employees. *Ib.*
9. **Injury to Passenger: Derailment: Contributory Negligence.** In an action for injury to a passenger on a railroad train from a derailment of a car, where defendant did not plead contributory negligence, an instruction for plaintiff which, *inter alia*, charged that plaintiff was not guilty of contributory negligence, should not have been given, but the giving of it did not constitute reversible error. *Siegel v. Ill. Central R. R. Co.*, 645.
10. **Care Required of Carrier.** A carrier of passengers must, so far as it is capable by human care and foresight, carry passengers, and is responsible for injuries caused by the slightest negligence. *Ib.*
11. **Injury to Passenger: Derailment: Res Ipsa Loquitur.** Where a passenger is injured by the breaking down or derailment of the coach in which he is riding, a prima-facie presumption arises that the accident was caused by the negligence of the carrier, and, to escape liability, it must show that the injury was the result of inevitable accident or some cause which human precaution and foresight could not have averted. *Ib.*
12. **Same: Sleeping Car Passenger: Liability of Railroad Company.** A railroad company is responsible for the operation of a train to which a sleeping car is attached, although the latter is owned by an independent company, and hence is liable for negligent operation of the train, causing a derailment of such car and consequent injury to a passenger therein. *Ib.*
13. **Same: Riding in Unauthorized Place.** A passenger on a railroad train, who, for a temporary purpose of his own, went into

**CARRIERS OF PASSENGERS—Continued.**

a sleeping car forming a part of the train, without paying the extra fare demanded for the privilege of riding therein, remained a passenger, and, as such, was entitled to recover for injuries sustained by reason of the derailment of such car while he was in it, although the coach in which he had been riding was not derailed. *Siegel v. Ill. Central R. R. Co.*, 645.

**CHOSSES IN ACTION.**

1. **Causes of Action: Only One from Single Wrongful Act: Not to be Separated in Parts.** Only one cause of action arises from a single wrongful act. Such cause of action cannot be split up and various suits brought for different items of damage. *Coy v. St. L. etc. R. R. Co.*, 408.
2. **Same: Only One for Single Wrongful Act: Exception.** The only exception to the rule that "one shall not be twice vexed for the same cause" is found in the case of unavoidable ignorance of the full extent of the wrongs or injuries received. *Ib.*

**COMMON LAW.**

**In Force Where: Presumption.** The presumption that the common law is not in force in a State will be indulged in only as to those States which were never subject to the common law. *Coy v. St. L. etc. R. R. Co.*, 408.

**CONTRACTS.** See Attorney and Client; Carriers of Live Stock; Damages; Insurance; Real Estate Brokers; Sales.

1. **Work and Labor: Services Performed for Political Committee: Compensation: Implied Contract.** In an action against the members of a political committee, the contestees in an election contest and certain other members of the party, for services rendered for the committee preliminary to the contest, where it did not appear that plaintiff intended, at the time the services were rendered, to charge therefor, and the character of the services and the circumstances under which they were rendered were such as to lead defendants to believe that plaintiff was merely giving his assistance as a matter of party service without expectation or hope of compensation, *held* that plaintiff was not entitled to recover. *Owen v. Hadley et al.*, 1.
2. **Same: Services Performed for Political Committee: Compensation: Implied Contract.** In an action against the members of a political committee, the contestees in an election contest and certain other members of the party, for services rendered in connection with the contest, where it was shown that the chairman of the committee retained an attorney to act in the contest and the latter employed plaintiff, without undertaking to bind the chairman or the other parties defendant, *held* that the chairman and the other members of the party who were sued were not liable on the theory that one becomes personally liable, who, without authority, assumes to act for another and procures the rendition of valuable services for him, since neither of such defendants procured the rendition of the services for which plaintiff sued. *Ib.*
3. **Same: Express Contract: Right to Recover on Quantum Meruit.** Where an existing express contract has been fully performed by plaintiff, and nothing remains to be done except pay-

## CONTRACTS—Continued.

- ment by defendant, plaintiff need not declare on the express contract, but may proceed on a *quantum meruit* to recover the reasonable value of the services, but, in such event, the recovery is limited to the reasonable value of the services, not exceeding the contract price. *Ib.*
4. **Same: Evidence.** In an action on a *quantum meruit* for services rendered under an express contract, the contract is admissible in evidence, and the rights of the parties are to be determined in accordance therewith. *Ib.*
  5. **Same: Implied Contract: Credit Given Third Person.** One who is benefited by work performed is not liable therefor if credit is given solely to another at whose request the work is performed. *Ib.*
  6. **Varying Written Contract: Parol Evidence: Instruments Within Rule.** A receipt for money, which recited that the money was to be invested in a deed of trust, was not a contract within the rule which forbids the contradiction or alteration of a written contract by parol evidence, but was merely a memorandum constituting evidence of the original oral agreement between the parties, whereby it was agreed that the money should be invested in a deed of trust, and was subject to explanation by parol evidence. *Martin v. Printz*, 52.
  7. **Modification of Written Contracts: Parol Evidence.** A contract which the Statute of Frauds does not require to be in writing may be varied or altered, even though it is in writing, by a subsequent parol agreement. *Ib.*
  8. **Same.** Plaintiff delivered money to defendant, under a contract which provided that defendant should invest the money for plaintiff in a deed of trust, and defendant executed a receipt reciting that the money had been received from plaintiff to be invested in a deed of trust. Defendant having failed to make the investment, plaintiff brought suit for the amount given to defendant, and defendant sought to defend on the ground that the contract had been modified so as to permit him to invest the money for plaintiff in another way, which he had done, but the court excluded the evidence offered in support of this defense. *Held*, that the receipt was not a contract, and that, even if it were, it could have been modified by a subsequent parol agreement, as the Statute of Frauds does not require a contract of this character to be in writing, and hence the court erred in excluding the testimony. *Ib.*
  9. **Varying Written Contract: Parol Evidence.** Where a written contract of sale was plain and explicit on its face and contained no provision authorizing the vendee to rescind if dissatisfied at the end of thirty days, parol evidence that such option was an agreed provision of the sale was inadmissible, as tending to vary a written contract. *Rigler v. Reid et al.*, 111.
  10. **Sale of Corn: Breach: Evidence Examined.** Action for breach of contract for sale of corn. Evidence examined and considered sufficient to warrant the finding of the jury that all the crop of corn grown on a certain plantation was sold by defendant to plaintiff and not merely so much thereof as could be delivered by defendant within sixty days. *Horner et al. v. Franklin*, 434.

## CONTRACTS—Continued.

11. **Breach: Duty to Minimize Damages.** One party to a contract has no right to proceed to execute it, after he has been notified that the other party has repudiated it, but his remedy is an action for damages for the breach; it being his duty to minimize the damages, and not to increase them by proceeding to perform. *Outcault, etc. Co. v. Wilson*, 492.
12. **Written Instruments: Effect of Alteration.** The statement of a cause of action, in a suit filed in a justice's court, alleged that defendant purchased of plaintiff a certain engine described and for a sum mentioned in a certain "contract," which was set out; that plaintiff caused the engine to be delivered to defendant at a certain place, and that defendant, after inspecting the engine, received and accepted it, but refused to pay plaintiff therefor, although plaintiff had performed his part of said contract of sale. The so-called "contract" was a mere memorandum, signed by defendant, evidencing the contract of sale which the parties had orally entered into, and was not filed with the statement, as required by Sec. 7412, R. S. 1909, when a suit is based upon a written instrument. *Held*, that the action was not based on the memorandum, and that the memorandum was pleaded merely as matter of inducement, and hence a defense that the memorandum had been altered was not tenable, in the absence of a showing that the alteration was made with fraudulent intent, since the alteration of a written instrument will not prevent a recovery for the original indebtedness evidenced by it or growing out of it, where the alteration was made without fraudulent intent. *Marth v. Wiskerchen*, 515.
13. **Building: Breach: Damages: Minimization: Excessiveness of Recovery.** In an action to recover the balance due on the stipulated price of \$1300 for erecting a structure in accordance with the provisions of a contract, where defendant set up a counterclaim in which it asked for damages for failure of plaintiff to do the work according to the requirements of the contract and within the time therein provided, *held* that the evidence did not make it appear that defendant suffered damages to the amount of its recovery on the counterclaim—\$1478.71; *held, further* that defendant did not seek to minimize the damages, as it was required by law to do. *Ferd Bauer E. & C. Co. v. Artic Ice etc. Co.*, 664.
14. **Contract for Benefit of Third Party: Rights of Third Party.** The rights of a party for whose benefit a contract is asserted to have been made are measured by the terms of the contract and are dependent upon its validity, and he cannot acquire a better standing to enforce the contract than that occupied by the party who made the contract for his benefit. *Llewellyn v. Butler et al.*, 525.

CONTRIBUTORY NEGLIGENCE. See *Carriers of Passengers; Damages; Master and Servant; Negligence; Railroads.*

## COURTS.

**Circuit Courts: Presumption of Regularity of Proceedings.** The circuit court is a court of general jurisdiction, and hence every presumption must be indulged in aid of its proceedings. *Wonderly v. Haynes*, 75.

**COVENANTS.** See **Conveyances; Landlord and Tenant; Warranty.**

1. **Obligations: Defenses.** A maker of an obligation cannot defend himself against its full performance because some one else is equally liable with him and has agreed with him to be wholly so. *Adkinson et al. v. McKay*, 391.
2. **Breach: Incumbrance: Excessive Payment to Remove: Burden of Proof.** Action for breach of covenant in warranty deed to remove an incumbrance from land conveyed, plaintiff's grantees having been forced to pay the mortgage debt. A prima-facie case was established by plaintiffs. The burden was upon the defendant to show that the payment made by plaintiff to remove the incumbrance was excessive, such being his contention. *Ib.*

**CONVERSION.** See **Corporations.****CONVEYANCES.**

1. **Mortgages and Deeds of Trust: Assumption of Mortgage: Liability of Grantee.** Where a deed conveying real property contains a recital that the grantee assumes and agrees to pay a mortgage debt on the property, and the deed is accepted by the grantee, he becomes personally liable to the mortgagee or his assigns for the payment of the debt; but this doctrine does not obtain where the grantee is not a real and genuine purchaser, whose name was inserted in the deed for convenience or as a mere channel for passing the title to another, nor does it obtain where the deed is executed and recorded without delivery to the grantee named therein and without his knowledge or consent, unless he subsequently ratifies such act. *Llewellyn v. Butler et al.*, 525.
2. **Mortgages and Deeds of Trust: Assumption of Mortgage: Liability of Grantee: Sufficiency of Evidence.** In an action by a holder of a note secured by deed of trust on real estate, against a person who was named as grantee in a deed conveying the property, which recited that the grantee assumed and agreed to pay the mortgage, defended on the theory that the deed was executed and placed on record without delivery to defendant and without his knowledge or consent, evidence held to support a finding in favor of defendant. *Ib.*
3. **Same: Effect of Recording Deed.** The recording of a deed containing a recital that the grantee assumes and agrees to pay a mortgage on the property conveyed, is evidence of delivery and acceptance only so far as it relates to the passing of title, and is insufficient, standing alone, to warrant a finding that the person named as grantee assented to the obligation to pay the mortgage debt. *Ib.*
4. **Same.** A husband who desired to transfer to his wife real estate, which was encumbered by a mortgage, conveyed it to defendants by a deed which recited that defendants assumed and agreed to pay the mortgage, and recorded the deed, without having delivered it to defendants and without their knowledge or consent. Thereafter, defendants conveyed the property to the wife by a deed which obligated her to assume and pay the mortgage. *Held*, that since a grantee who assumes the payment of a mortgage debt is liable although his grantor is not liable, the insertion of the covenant in the deed to the wife, obligating her to assume the mortgage, had

**CONVEYANCES—Continued.**

no tendency to show that defendants ratified the similar covenant in the deed to them. *Llewellyn v. Butler et al.*, 525.

5. **Effect of Invalid Covenants.** A deed conveying real estate to a person who acted merely as a conduit through whom the title passed was not void merely because one of its covenants obligating the grantee to pay a mortgage on the property was invalid. *Ib.*

**CORPORATIONS. See Levees.**

**Liability for Tort of Officers: Conversion.** In order to render a corporation liable for the tort of its secretary in converting shares of its capital stock, the certificates of which were sent to him to be transferred, it must be shown that the secretary, in converting the stock, was acting for the corporation. *Mayger v. Nichols*, 102.

**COUNTERCLAIM.** See *Special Tax Bills; Justices of the Peace; Vendor and Vendee; Verdicts.*

**CRIMES AND PUNISHMENTS.**

**Child Abandonment: Instructions: Necessity of Covering Case.** Under Sec. 5231, R. S. 1909, it is obligatory on the trial court, in criminal cases, to cover the whole case by instructions; and hence, in a prosecution for child abandonment, under Sec. 4495, as amended by Laws 1911, p. 193, where defendant requested the court to charge on the defense relied upon, that the wife refused to live with defendant in the habitation provided by him, or to let him take the children, *held* that the defense should have been covered by proper instructions. *State v. Tietz*, 672.

**CRIMINAL LAW.**

**Information: Evidence: Variance: Slander and Libel.** Criminal prosecution for slander and libel. Where the evidence fails to show that substantially the same words were used by the accused as he is charged with having spoken there is a variance. *State v. Westbrook*, 421.

**DAMAGES.** See *Carriers of Goods; Carriers of Passengers; Contracts; Life Insurance; Railroads.*

1. **Instructions: Allowing Excessive Recovery: Harmless Error.** In an action for personal injuries, the instruction on the measure of damages was not prejudicially erroneous, by reason of the fact that it authorized the jury to allow damages for certain items up to a certain amount (not exceeding the amount claimed therefor in the petition), which amounts were greater, by \$4.60, than the amounts shown by the evidence, since it will not be assumed that the jury disregarded the evidence and found the full amount authorized by the instruction. *Warnke v. Leschen etc. Rope Co.*, 30.
2. **Same.** In an action for injuries to plaintiff's minor son, the instruction on the measure of damages was not prejudicially erroneous for authorizing the jury to award damages for future loss of earnings, in the absence of any evidence tending to show that such loss would be sustained, where the verdict was

## DAMAGES—Continued.

for less than the loss of earnings shown to have accrued up to the time of the trial, in view of sections 1850 and 2082, R. S. 1909, requiring the appellate court to disregard errors not affecting the substantial rights of the parties. *Ib.*

3. **Measure of Damages: Instructions.** An instruction which merely charges the jury as to the measure of damages they are to apply in case they find a verdict for plaintiff, is not defective because it does not cover all the issues, including the defenses. *Dodt v. Prudential Ins. Co.*, 168.
4. **Carriers: Mistreatment of Passenger: Damages Not Excessive, When.** Action by a woman passenger for damages because of mistreatment and insults at the hands of the defendant's conductor. The evidence showed great humiliation suffered in the presence of an acquaintance and several other passengers; that plaintiff was so unnerved that she was sick for a week. An award of \$250 actual and \$500 punitive damages was not excessive. *Cook v. Lusk et al.*, 288.
5. **Payment: Liability of Another: Duty to Minimize Damages.** It is the duty of one who has to pay damages, for which he intends to hold another liable, to mitigate and minimize the damages paid so far as can reasonably be done. *Carthage Stone Co. v. Traveler's Ins. Co.*, 318.
6. **Action Against Surgeon for Malpractice: Pleadings: Allegations as to Financial Condition of Parties: Not Proper, When.** Action against a surgeon for malpractice. No punitive damages were claimed. Allegations in the petition as to the financial condition, poverty or wealth of either party are improper. *Fowler v. Burris*, 347.
7. **Personal Injuries: Verdict: Excessiveness.** In an action for personal injuries it was shown that plaintiff's leg was permanently injured and its strength and usefulness greatly impaired. A verdict for \$2500 is not so grossly excessive as to warrant the appellate court to require a remittitur. *Baxter v. Campbell Lbr. Co.*, 352.
8. **Public Improvements: Damnum Absque Injuria.** In effecting public improvements, damages often follow which are remote and consequential. The courts regard them as *damnum absque injuria*. *Campbell Lbr. Co. v. Levee Dist. et al.*, 371.
9. **Discretion Allowed Jury.** Large discretion is allowed a jury in awarding damages for personal injuries. *Winston v. Lusk et al.*, 381.
10. **Assault; Excessive Damages.** A boy sixteen years of age was assaulted by defendants' station agent while purchasing a ticket from said agent. Evidence reviewed and circumstances considered. *Held*, that a verdict for a thousand dollars and five hundred dollars punitive damages was excessive as to the actual damages, which is reduced to five hundred dollars. *Bledsoe v. West et al.*, 460.
11. **Personal Injuries: Excessiveness of Verdict.** A verdict for \$5000 for the loss of an eye was not excessive. *Jorkiewicz v. Amer. Brake Co.*, 534.



**DAMAGES—Continued.**

12. **Instructions: Waiver of Generality.** In an action for injuries resulting in the loss of an eye, an instruction which permitted the jury to assess damages in such sum as would compensate plaintiff for the loss of his eye, did not purport to authorize a recovery for loss of earnings, demanded in the petition, but not proved, and inasmuch as the instruction was correct in its general scope, defendant was in no position to complain that it was too broad, in the absence of a request by him that its scope be limited. *Jorkiewicz v. Amer. Brake Co.*, 534.
13. **Breach of Contract: Minimization.** It is the duty of one injured by the breach of a contract to minimize the damages. *Ferd Bauer E. & C. Co. v. Arctic Ice etc. Co.*, 664.
14. **Mines and Mining: Failure to Furnish Props: Contributory Negligence.** A miner requested props but they were not furnished as required by the statute, Sec. 473, R. S. Mo. 1909. He had removed the dirt beneath the vein of coal for a distance of twenty-three inches back from the face of the coal and for twenty feet along the vein. Notwithstanding the failure to receive props, he seated himself at one end of this coal and began cutting through. The evidence showed that when coal is prepared in this way, the method pursued to get it down is to cut through the vein and then pry it loose from the wall or ceiling to which it hangs; that while there was danger of the coal falling on account of a lack of props, it was not so openly dangerous as to threaten immediate danger so that no reasonable man would have attempted to work there. *Held*, that the question of contributory negligence was for the jury. *Runyan v. The Marceline Coal, etc. Co.*, 707.
15. **Same.** Since the suit is on the failure to furnish props as required by the statute, plaintiff ought not to be denied recovery as a matter of law, unless the danger of the situation was so apparent and imminent that plaintiff's placing himself therein would amount to self-inflicted injury. He ought not to be denied recovery merely on a showing that there was some risk attending the further prosecution of the work, and that he assumed that risk. *Ib.*
16. **Pleading.** It is immaterial whether defendant pleaded contributory negligence or not when the proof offered to sustain plaintiff's cause of action contains and reveals the alleged negligence relied upon by defendant as contributory. In such case defendant is entitled to have the law of contributory negligence applied whether it was pleaded or not. *Ib.*

**DEEDS OF TRUST.** See *Mortgages and Deeds of Trust*.

**DIVORCE.**

1. **Evidence.** In an action for divorce by the wife and cross-bill by the husband the trial court found against both parties. On appeal the evidence is examined and the conclusion reached that the wife was entitled to the divorce. *Meek v. Meek*, 703.
2. **Separation and Return: Condonation.** If the husband continuously abuses his wife until her condition is intolerable and she leaves him and then returns, and this is repeated seven times, through a series of years, and her return each time is on his promise to change his conduct and treat her better,

**DIVORCE—Continued.**

there is no condonation, and a breach of his promise revives the offense. *Ib.*

3. **Parent and Child: Liability of Father for Support of Child.** In the absence of a provision made for the support of minor children, the father continues primarily liable therefor after divorce, and the mother, having their custody, may ordinarily recover from him for their maintenance, if he fails or refuses to furnish it; but where, in connection with the divorce proceedings, a settlement is made, whereby the father makes provision for the future support of the minor children, which is accepted by the mother as satisfactory, he is no longer liable, *in an action by her*, for support furnished them by her, whatever liability may otherwise continue to attach to him, growing out of his legal duty to provide for his off-spring. *La-Rue v. Kempf*, 57.
4. **Same: Defenses.** In an action by a divorced wife to recover from her former husband for the support of their minor children, whose custody had been awarded to her, the fact that he had repeatedly offered to take the children himself and support them was no defense to the action; her refusal to permit him to take them not justifying his refusal to provide for their maintenance. *Ib.*

**DRAINAGE DISTRICTS. See Levees.**

1. **Revenue Laws: Term Includes What.** The term "Revenue Law" includes and covers all the laws relating to the disbursement of the revenue and its preservation as well as provisions relating to the assessment, levy and collection thereof. *State ex rel. v. Oliver*, 272.
2. **Same: Action Involving: Jurisdiction of Appeal in Supreme Court.** An action to collect taxes for the payment of a drainage ditch, assessed by the county court under sections 5578, 5635, R. S. 1909, involves the construction of the revenue laws of the State of which the Supreme Court alone has jurisdiction on appeal. (Constitution, Art. 6, sec. 12.) *Ib.*
3. **Damages to Land: Res Adjudicata.** An owner of lands within a drainage district organized under Sec. 5578, R. S. 1909, *et seq.*, cannot recover from the district for damages to his land caused by the flooding thereof and the pollution of his well from water flowing through the ditch, since it is conclusively presumed that the viewers allowed damages for such injuries, pursuant to Sec. 5586, and therefore, the question is *res adjudicata*, whether the owner availed himself of his rights under the statute or not. *Vansickle v. Drainage Dist.*, 563.

**EJECTMENT. See Vendor and Vendee.****ELECTIONS.**

1. **Action Against Judges: Pleading.** In an action against judges of election to recover damages for acts done by them in the discharge of their official duties, the cause of action must be alleged with considerable technical precision. *McGowan v. Gardner et al.*, 484.
2. **Same: Pleading: Sufficiency of Petition.** In an action against judges of election, for their refusal to allow plaintiff to vote

**ELECTIONS—Continued.**

at an election, the petition alleged that defendants were the judges of election of the fourth ward, that plaintiff was "a citizen and resident of said fourth ward," that the city, on a certain date, "held a general election at the various voting precincts in said fourth ward," and that defendant election judges refused to permit plaintiff to vote at said election. The petition did not aver that plaintiff was a resident of the voting precinct or election district of the fourth ward in which he offered to vote, nor did it aver that the fourth ward constituted one voting precinct or election district. *Held*, that the petition does not state a cause of action, in view of Art. 8 of the Constitution, which prescribes the qualifications of voters, and Sec. 5800, R. S. 1909, which provides that each voter shall vote in the precinct in which he resides, for the reason that it does not aver that plaintiff offered to vote in the particular precinct or election district in which he resided. *McGowan v. Gardner et al.*, 484.

3. **Same: Liability of Judges.** In performing the duties of their office, election judges act in a judicial capacity and cannot be held liable in damages for a mere error of judgment; and hence they are not liable for their refusal, in good faith, to permit a qualified voter to vote, but are liable in such a case, only where they act maliciously or fraudulently. *Ib.*

**EQUITY. See Executors and Administrators.**

1. **Bill in: Remedy at Law: Cause of Action.** If a petition in equity discloses that the plaintiff has an adequate remedy at law, no cause of action is stated in equity. *Boynton v. Boynton et al.*, 713.
2. **Judgment: Satisfaction: Fraud: Legal Remedies.** A petition in equity was founded upon allegations that the plaintiff had entered satisfaction of a judgment obtained against defendants therein through the fraud of defendants. It was held that plaintiff had adequate legal remedies by motion in the same case to cancel the satisfaction; or, by an action on the judgment and the petition in equity should be dismissed. *Ib.*
3. **Motion: Audita Querela: Trial by Jury.** A motion in the same case to cancel satisfaction of a judgment obtained by fraud has practically superseded the old writ *audita querela*. The motion, if presenting matter for contested facts, should be tried with a jury. *Ib.*
4. **Audita Querela: A Legal Remedy.** If an independent action through *audita querela* be resorted to, to set aside an entry of satisfaction of a judgment as having been procured by fraud, it is a legal and not an equitable remedy. *Ib.*
5. **Improper Joinder: Waiver.** If two counts in equity to cancel an entry of satisfaction of a judgment on account of fraud be joined with a count at law to recover the amount of the judgment and the defendants proceed to trial before the court (waiving a jury) on all three counts without objection, they waive the irregularity. *Ib.*
6. **Action on Judgment: Fraud: Practice: Pleading.** Where an entry of satisfaction of a judgment has been procured by fraud, and the plaintiff desires to pursue the course of bringing an action on the judgment, he may bring such action, when

**EQUITY—Continued.**

the defendant should plead the satisfaction as matter of defense, and then plaintiff should set up the fraud in avoidance, by reply. *Ib.*

**ELECTRICITY.****Death of Lineman: Defective Insulation: Sufficiency of Evidence.**

In an action for the death of a lineman, caused by his coming in contact with a wire charged with electricity maintained by defendant, evidence *held* sufficient to establish a specific averment in the petition, that the insulation on the wire was worn and rotten, and hence the case was one for the jury. *May et al. v. City of Hannibal*, 602.

**EVIDENCE.** See Animals; Appellate Practice; Carriers of Passengers; Contracts; Criminal Law; Divorce; Electricity; Fraud and Deceit; Instructions; Justices of the Peace; Master and Servant; Money Had and Received; Negligence; New Trial; Parent and Child; Physicians and Surgeons; Pleading; Pledges; Railroads; Real Estate Brokers; Sales; Special Tax Bills; Street Railways.

1. **Conclusions.** The conclusion of a witness has no probative force. *David v. Clarksville Cider Co.*, 13.
2. **Physical Facts.** Testimony cannot be rejected as being opposed to the physical facts unless it is plainly and palpably incompatible with physical laws or undisputed facts. *Warnke v. Leschen*, etc. Co., 30.
3. **Photographs.** Although photographs which are properly identified and are shown to represent the situation as witnesses saw it are not to be received as evidence of the facts, they are nevertheless admissible as illustrations of the testimony, and this is true even though the situation that existed at the time the photographs were taken was not in all respects precisely as it was at the time of the occurrence in controversy. *Lauff v. Kennard etc. Co.*, 123.
4. **Secondary Evidence: Discretion of Trial Court in Admitting.** It is largely within the discretion of the trial court when secondary evidence should be admitted and when sufficient proof of the loss of a written instrument has been made. *Ib.*
5. **Preliminary Proof.** In an action on an attachment bond, proof of the loss of the papers in the attachment suit considered sufficient to authorize the admission of secondary evidence as to their contents. *State ex rel. v. Yount*, 258.
6. **Objections: What Not Sufficient.** An objection to the evidence introduced because "it is irrelevant and immaterial to the case," is too general. *Tanner v. St. L. etc. Ry. Co.*, 264.
7. **Death at Railroad Crossing: Collisions: What Evidence Relevant.** Action for damages because of the death of the plaintiff's husband resulting from a collision with defendant's train at a crossing. Evidence of the age and condition of the health of the deceased may be admissible as an aid to the jury in considering the alleged contributory negligence of deceased. *Ib.*
8. **Principal and Agent: Agent's Declarations Prior to Proof of Agency: Inadmissible.** Declarations made by an alleged agent before there is any testimony tending to prove that relations are inadmissible. *Woodin v. Leach*, 275.

**EVIDENCE—Continued.**

9. **Invited Error.** Defendant will not be heard to complain of the admission of evidence which is erroneous, where he himself has invited the injunction thereof into the case. *Robertson v. Western Union etc. Co.*, 281.
10. **Harmless Error: Concerning Interest of Witness.** In an action against master for personal injuries, plaintiff was permitted to show that defendant's foreman, testifying for his employer, received \$100 per month. If error was thereby committed it was harmless. *Baxter v. Campbell Lbr. Co.*, 352.
10. **Arkansas: Acts of Congress Relating to: Statutory Provisions.** Various acts of congress and territorial laws of Missouri relating to the territory now embraced within the State of Arkansas which was formerly a part of the territory of Missouri, considered., *Coy v. St. L. etc. R. R. Co.*, 408.
11. **Judicial Notice: Common Law in Arkansas: Congressional Provisions.** Because of the various acts of congress as above, judicial notice is taken of the fact that the common law is in force in Arkansas. *Ib.*
12. **Memorandum of Agent: Not Admissible, When.** Action for breach of contract of sale of corn, the controversy being as to the quantity included in the contract of sale. Memorandum of defendant's agent, made at the time the contract was made by telephone communication, is not admissible. *Horner et al. v. Franklin*, 434.
13. **Fraternal Benefit Societies: Custom of Local Loge.** Action on beneficiary certificate, the defense being that the certificate was delivered to the insured but that he was never initiated, adopted or admitted as a member as was required by the by-laws as a condition precedent to membership. Evidence was offered of a custom of the local lodge not to exact this condition. There was no error in excluding such evidence where there was no offer to show the number of certificates that had been thus delivered or that such a course had been pursued by the local lodge so long that the supreme lodge must necessarily have known of it. *Gilmore v. Modern Brotherhood of Amer.*, 445.
14. **Provisions of By-laws as to Initiation.** Action on beneficiary certificate, the defense being that it was delivered without the insured having been initiated, such initiation being necessary under defendant's by-laws. The by-laws on this point were properly admitted in evidence, being authorized by Laws 1911, p. 292, sec. 22, prohibiting a waiver by subordinate officers of such a provision for initiation. *Ib.*
15. **Prima-facie Evidence: Definition.** Prima-facie evidence means evidence which is sufficient to establish a fact unless rebutted. *Ib.*
16. **Prima-facie Case: Definition.** A prima-facie case is one which is, in the absence of explanation or contradiction, an apparent case sufficient in the eyes of the law to establish the fact and if not rebutted, remains sufficient for that purpose. *Ib.*
17. **Judicial Notice: Election Precincts.** The appellate court cannot judicially know that a ward of a city of the third class

## EVIDENCE—Continued.

constituted one election district. *McGowan v. Gardner et al.*, 484.

18. **Original Memoranda: Res Gestae.** A minute or memorandum in writing, made in the usual course of business, at the time when the fact recorded took place, is admissible in evidence, if authenticated by the oath of the party making it, when the surrounding circumstances make it probable that the fact recorded occurred; and hence, in an action by a real estate broker for a commission for having procured an exchange of land, his entry in a small book carried in his pocket, made in defendant's presence, when he suggested that defendant see the party with whom the exchange was finally made, and in the usual course of business, was admissible as part of the *res gestae*. *Jennings et al. v. Overholt*, 505.
19. **Inference from Inference.** Although reasonable inferences may be drawn from facts in evidence and utilized in support of the verdict, other and additional inferences, and presumptions of fact based alone upon, or afforded by, prior inferences cannot be utilized as evidence. *Whitesides v. C. B. & Q. R. R. Co.*, 608.
20. **Objection to Testimony.** Unless an objection to testimony offered or to a question asked specifies a valid ground therefor, the overruling of such objection will not constitute reversible error. *Runyan v. Marceline Coal etc. Co.*, 707.
21. **Admissions.** Where witnesses testify that plaintiff shortly after his injury made statements tending to show that he was guilty of contributory negligence, and plaintiff does not deny them, the fact that he made such statements is to be taken as true. But plaintiff is not to be conclusively bound by them where they were not statements of a fact but rather conclusions of law and the contention that they defeat a recovery rests upon an inference to be drawn from them. *Ib.*

## EXECUTORS AND ADMINISTRATORS.

1. **Equity: Jurisdiction of Probate Matters.** While a suit in equity may sometimes be maintained in respect to matters which would ordinarily appear to be within the jurisdiction of the probate court, yet this is true only in those rare instances where the provisions of the administration law fail to furnish a complete and adequate remedy in the premises and where relief may be afforded only in a court of purely equitable cognizance. *Nebel, Admr. v. Bockhorst, Admr. et al.*, 499.
2. **Same: Sale of Land to Pay Legacies.** An application to sell a decedent's real property to pay legacies alleged to have been charged thereon is within the exclusive jurisdiction of the probate court, conferred by Secs. 150, 154, R. S. 1909, subject to the right of appeal to the circuit court, and hence the circuit court has no jurisdiction of a bill in equity for such relief. *Ib.*

**FRATERNAL BENEFICIARY ASSOCIATIONS.** See *Evidence; Insurance.*

**FRAUD. See Vendor and Vendee.**

1. **Statements Made Carelessly Without Regard to Truth or Falsity: Actionable.** A statement made carelessly, without regard to its truth or falsity, which proves to be untrue, is fraud and an action for fraud and deceit can be maintained by one who is thereby damaged. *Connecticut etc. Ins. Co. v. Carson*, 221.
2. **False and Fraudulent Representations: Sale of Land: Rescission.** Certain false representations made by vendor of agricultural land which induced the purchase thereof, examined and considered sufficient to entitle the purchaser to rescind. *Ib.*
3. **Sale of Land: Principal and Agent: Misrepresentations: Statement.** Evidence reviewed and fraud of agent in sale of land held binding on principal. *Ib.*

**FRAUD AND DECEIT. See Sales.**

1. **Sales: Rescission: Evidence.** Where a person made two separate purchases, the former of which he elected to affirm and the latter of which he sought to set aside on the ground of fraud, evidence tending to prove fraudulent misrepresentations with respect to the first purchase was irrelevant and hence inadmissible in the suit involving his right to rescind the second transaction. *Rigler v. Reid et al.*, 111.
2. **Breach of Promise: Sales: Rescission.** The cancellation of a contract of sale on the ground of fraud may not be had for a mere breach of promise made by the vendor. *Ib.*
3. **Sales: Rescission: Sufficiency of Evidence.** In an action on a promissory note, defended on the theory that the note was given for the purchase price of corporate stock which defendant was induced to purchase from plaintiff through the latter's fraudulent misrepresentations, evidence held insufficient to warrant submission of the defense to the jury, and hence it is held a verdict should have been directed for plaintiff. *Ib.*
4. **Misrepresentations.** The mere fact that a vendor sent persons to the vendee, telling him what a good thing the business purchased was, without more, is insufficient to warrant a finding of fraud. *Ib.*
5. **Same: Opinion.** A statement by the vendor of corporate stock that the stock was very valuable was not sufficient to warrant a finding of fraud, since it amounted to no more than an expression of opinion. *Ib.*
6. **Same: Necessity of Reliance.** Misrepresentations cannot be made the predicate of a finding of fraud if the person to whom they are made is not misled by them. *Ib.*
7. **Evidence.** Fraud cannot be presumed nor established by conjecture or suspicion, and substantial evidence is required to prove it. *Maddux v. St. L. Union Trust Co.*, 138.

**FRAUDULENT REPRESENTATIONS.**

1. **Fraud and Misrepresentation: Principal and Agent: Ratification.** Evidence examined and considered not sufficient to show that the owner of certain timber accepted the benefit of the

## FRAUDULENT REPRESENTATIONS—Continued.

sale of same after knowledge of the fraud of a third person who misrepresented its value, such party not having been proven to be the agent of the owner so as to bind him by the fraud. *Woodin v. Leach*, 275.

## HABEAS CORPUS. See Prohibition.

1. **Custody of Child: Retention of Jurisdiction After Final Judgment.** In a *habeas corpus* proceeding by the father of a child against its grandparents, for the custody of the child, the court had no power to incorporate in the judgment remanding the child a provision that the court retained jurisdiction of the cause for the purpose of making such other orders from time to time, with reference to the custody of the child, as its best interest might require, since the court exhausted its jurisdiction when it ordered the child remanded; Sec. 2510, R. S. 1909, not being applicable, for the reason that it relates only to *habeas corpus* proceedings between husband and wife. *State ex rel. v. Rassieur*, 214.
2. **Same: Issues.** In a *habeas corpus* proceeding by the father of a child against its grandparents, for the custody of the child, the petition prayed that the writ be issued to bring the child before the court that she may be released from the restraint and keeping of respondents, and that the care, custody and control of the child be awarded to petitioner. The return of respondents asked that they be discharged from the writ and that the child be restored to their custody and control. *Held*, that a provision in the judgment remanding the child to the custody of respondents, that the court retained jurisdiction of the cause for the purpose of making such other orders, from time to time, with reference to the custody of the child, as its best interest might require, was not within the issues and was *coram non judice*. *Ib*.
3. **Nature of Action.** *Habeas corpus* is an action at law. *Ib*.
4. **Appellate Practice: Appealable Orders.** A judgment in a *habeas corpus* proceeding, either discharging or remanding the petitioner, is not appealable. *Ib*.

## HUMANITARIAN DOCTRINE. See Negligence; Railroads; Street Railways.

## HUSBAND AND WIFE. See Insurance: Married Women.

1. **Occupancy of Real Estate: Liability of Wife for Rent.** Where the use of certain real estate was bequeathed to a married woman, by the will of her father, for one year after his death, together with a proportionate part of the proceeds of a sale then to be made by the executor, and she and her husband held over for a further period during litigation, in which she unsuccessfully attempted to enforce a claim to the fee title to the land, she, and not her husband, was liable for the use and occupation, which claim was properly allowed as a set-off against her share of the proceeds. *Oliver v. Epperson et al.*, 622.



**INDICTMENTS AND INFORMATIONS.** See **Crimes and Punishments: Criminal Law.**

1. **Intoxicating Liquors: Prescription of Physician: Sufficiency of Charge.** An indictment charging a physician with illegally issuing a prescription for liquor examined and considered to sufficiently charge that such liquor was not intended to be used for medicinal purposes. *State v. Bates*, 365.
2. **Libel and Slander: Separate Conversations.** In a trial for slander and libel, where libelous conversations are alleged to have been held by accused at different times in the presence of different persons, the better and safer practice requires that the conversations be separately stated. *State v. Westbrook*, 421.

**INJUNCTION.** See **Levees.**

**INSANE PERSONS.**

**INSTRUCTIONS.** See **Animals; Appellate Practice; Damages; Master and Servant; Negligence; Physicians and Surgeons; Street Railways.**

1. **Refusal: Covered by Other Instructions.** It is not error to refuse an instruction which submits a theory that is fully covered by other instructions given. *Hertel v. Cuba*, 190.
2. **Same: Not Supported by Evidence.** It is not error to refuse an instruction which submits a theory that is not supported by the evidence. *Ib.*
3. **Carriers: Mistreatment of Passenger by Conductor: Evidence: Harmless Error.** An instruction in an action against a railroad by a lady passenger for damages because of mistreatment by the conductor, required a finding that plaintiff was frightened. There was sufficient evidence of humiliation and mental anguish and even if it was not fully established that plaintiff was frightened, defendants were not prejudiced thereby. *Cook v. Lusk et al.*, 288.
4. **Physician and Surgeon: Malpractice: Erroneous Instruction on Measure of Damages.** Action against surgeon for malpractice. An instruction on measure of damages is examined and considered erroneous because it charged defendant with liability for the results of the original accident which caused the injury as well as for his own negligent treatment. *Fowler v. Burris*, 347.
5. **Same: Malpractice: Measure of Damages.** Action against surgeon for malpractice in negligently treating plaintiff's dislocated and broken wrist. The surgeon could be held only for increased injury, and pain of mind and body, if any, which may have resulted from his negligent method of treatment together with the impairment of the use of the arm because thereof. *Ib.*
6. **Same: Degree of Care.** An instruction for plaintiff in an action against a surgeon for malpractice examined and considered erroneous, because it required too high a degree of care and because the language thereof was not clear nor accurate. *Ib.*

## INSTRUCTIONS—Continued.

7. **Master and Servant: Reasonably Safe Place to Work.** Action by servant against master for injuries received in a sawmill. Instruction complained of examined in connection with other instructions given and *held* not to impose too great a burden on the master in furnishing a reasonably safe place to work. *Baxter v. Campbell Lbr. Co.*, 352.
8. **Considered All Together.** The instructions in a case must all be considered together. *Ib.*
9. **Master and Servant: Assumption of Risk: Contributory Negligence.** Action by servant against master for personal injuries. Instructions examined and read together and considered not misleading, though in form submitting the defense of assumption of the risk instead of contributory negligence. *Ib.*
10. **Curing Omission by Other Instructions: Carriers: Assault.** In an action by a passenger for personal injuries because of an assault by defendant's brakeman, an instruction was given to find for plaintiff if he, under the circumstances mentioned, while attempting to board the car, was struck by the brakeman, and such striking was unjustifiable. The instruction is not erroneous because it failed to state the facts constituting justification, where they are stated in an instruction given for defendant. *Winston v. Lusk et al.*, 381.
11. **Request That They be Made More Explicit: When Necessary.** An instruction as to damages *held* correct, though general in its scope. The defendant should, if he desired, have asked for more definite and explicit instructions pointing out the proper element of damages and excluding any improper element. *Ib.*
12. **Harmless Error.** An error in an instruction in not limiting the amount of actual damages to the amount sued for, is rendered harmless by the fact that the jury entered a verdict for a much less amount. *Ib.*
13. **Assault: Jury May Consider What.** In an action by a passenger for damages because of an assault at the hands of a railroad brakeman, it is proper for the jury to consider that the assault was made at a public place, also the wounded feelings, humiliation and disgrace of the plaintiff as elements of actual damages in addition to his bodily injuries. *Ib.*
14. **Libel and Slander: Jury Judges of Law and Fact.** In a trial for slander and libel an instruction was given telling the jury that it was the judge of the law and fact and that it was not bound to find as the judge directed. *Held*, not error. *State v. Westbrook*, 421.
15. **Same: Charge and Proof to Correspond.** In a trial for slander and libel an instruction was given authorizing a conviction if the jury found that "the accused spoke the words charged or words substantially equivalent." This was error. It is the charge and proof which must substantially correspond, not the words. *Ib.*
16. **Libel and Slander: No Evidence on Which to Base Instruction: Error.** Trial for slander and libel. A given instruction *held* erroneous because there was no evidence to support it. *Ib.*

## INSTRUCTIONS—Continued.

17. **Comment on Evidence: Error.** An instruction which singles out testimony of a witness and comments thereon is erroneous. *State v. Westbrook*, 421.
18. **Defense Covered by Separate Instructions.** An instruction for plaintiffs covering their whole case, failed to incorporate defendant's defense. No error was committed where another instruction was given for defendant fully submitting his theory of the case. *Horner et al. v. Franklin*, 434.
19. **Evidence.** Instructions must be founded on evidence. *Bledsoe v. West et al.*, 460.
20. **Not Applicable to Case Made: Properly Refused.** Plaintiff was assaulted by defendants' ticket agent while purchasing a ticket for passage over defendants' railroad. An instruction to the effect that if the assault grew out of a personal difference and difficulty between plaintiff and defendants' agent, plaintiff could not recover, was properly refused on the ground that it was not applicable to the case made. *Ib.*
21. **Conformity to Issues: Waiver.** The general rule is, that instructions must be confined to the issues in the case as pleaded; but where, at the trial, evidence which is outside of the pleadings is introduced without objection, it is not error to instruct on these matters, as well as on the case made by the pleadings. *Menefee v. Diggs*, 659.

## INSURANCE ACCIDENT.

1. **Loss of Hand or Foot: Construction of Policies.** Where an accident insurance policy provides for indemnification against "loss" of a hand or foot, actual physical severance of such member is not necessary to warrant a recovery, but it is sufficient if insured is wholly and permanently deprived of the use thereof; and even where the policy provides that "loss" means "actual amputation," it is not essential to a recovery that the entire member shall be severed, but is sufficient if so much thereof is severed as to leave the remainder useless for all practical purposes. *Weist v. United States, etc. Ins. Co.*, 22.
2. **Loss of Hand: Severance: Policy Construed.** An accident insurance policy indemnifying against loss of a hand, but which provides that such loss shall mean "loss by severance at or above the wrist joints," does not cover a loss of the entire hand with the exception of the little finger and a portion of the palm supporting it, although such finger and portion of the palm are permanently paralyzed and of no use or service to insured. *Ib.*

## INSURANCE.

1. **Construction of Policy.** Any ambiguity or uncertainty of meaning in an insurance policy should be resolved in favor of insured and against insurer. *Weist v. United States etc. Ins. Co.*, 22.
2. **No Insurable Interest: Contract Void.** Contracts of insurance are void unless the insured has some insurable interest in the subject-matter. *Wisecup v. Amer. Ins. Co.*, 310.
3. **Waiver: Cannot Render Valid a Void Contract.** An insurance company cannot be held to a contract of insurance on the

## INSURANCE—Continued.

principle of waiver, where the company could not make such a contract in the first instance. *Ib.*

4. **Husband and Wife: Property of Wife: Insurable Interest of Husband.** A husband has no insurable interest in the real property of the wife which he has conveyed to her through a third person, though by reason of the marital relation he collects the rents and uses the money. Such property is her separate property under the statute. [Secs. 8308, 8309, R. S. 1909.] *Ib.*
5. **Indemnity Insurance: Statement of Facts.** Suit on a policy of indemnity insurance against damages arising from personal injuries. Statement of case. *Carthage Stone Co. v. Traveler's Ins. Co.*, 318.
6. **Indemnity Insurance: Settlement of Claim: Rights and Liabilities.** Plaintiff carried indemnity insurance. A duty devolved upon it as the insured to settle claims against it on the most advantageous and reasonable terms without losing its own rights to recover against the insurer. *Ib.*
7. **Same: Rights and Liabilities of Parties.** Under contract of indemnity insurance, the refusal of the insurer to defend a case with the insured's knowledge of that fact, gives the insured a right to settle the case in good faith, keeping in view the principal that the insured should so deal with the case as to minimize, as much as possible and reasonable, the damages to be charged against the insurer. *Ib.*
8. **Same: Duty to Minimize Damages.** Defendant, an indemnity insurance company, refused to defend a suit for damages against insured on the ground that no notice of the injury had been given it, but notified insured that settlement could be made for \$150 and its duty to minimize the loss. Insured allowed judgment to go against it by default for \$3000, the full amount claimed. The rule as to one's "duty to minimize the damages" *held* to apply. (*FARRINGTON, J., dissenting.*) *Ib.*
9. **Fraternal Benefit Societies: License: Certified Copy or Duplicate: Evidence.** A duly certified copy or duplicate of its license is prima-facie evidence that the license is a fraternal benefit society. (*Laws 1911, p. 290, sec. 16.*) And there being no contradictory evidence this is sufficient to bring such licensee within the provisions of the law relating to fraternal beneficiary societies. *Gilmore v. Modern Brotherhood of America*, 445.
10. **Fraternal Benefit Societies: Initiation Prerequisite to Membership.** Initiation is a condition precedent to membership in fraternal beneficiary associations. *Ib.*
11. **Fraternal Benefit Societies: Initiation: Evidence.** Action on a beneficiary certificate of insurance, defended on the ground that the certificate had been delivered but that the insured had never been initiated, as required by the by-laws of the association as a condition precedent to membership. Evidence on the issue of such initiation examined and considered insufficient to go to the jury. *Ib.*
12. **Fraternal Benefit Societies: Certificates: Presumptions as to Possession.** Where there is no contradictory evidence it is

**INSURANCE—Continued.**

presumed that a beneficiary certificate was regularly deposited in proper hands. But such presumption will not be permitted to contradict the plain, uncontroverted facts as to how it got into the hands of the individual. *Gilmore v. Modern Brotherhood of America*, 445.

13. **Insurable Interest.** A party has no right to take and collect a greater amount of insurance interest on another's property than the value of his own interest. *Rutherford Admx. v. Sample*, 469.
14. **On Mortgaged Property: Procured by Mortgagee for Mortgagor: Proceeds.** A mortgagee did not insure his own interest but took out insurance for another at the expense of the mortgagor. Upon collecting the policy he was duty bound to account to the mortgagor for the proceeds. *Ib.*

**INTEREST. See Special Tax Bills.****INTOXICATING LIQUORS. See Husband and Wife.**

1. **Prescription by Physician: Good Faith Examination.** Under Sec. 5784, R. S. 1909, it is incumbent on a physician who issues a prescription for liquor to ascertain in good faith that the liquor prescribed is a necessary remedy. *State v. Bates*, 365.
2. **Same: Good Faith.** If a physician in good faith prescribes liquor for a patient as a necessary remedy he is not subject to punishment for error in judgment, nor because others of his profession differ from him in such conclusion. Nor is he liable although the patient, without the physician's knowledge, intends to use the liquor as a beverage. *Ib.*
3. **Prescription by Physician: Good Faith: Question for Jury.** In a prosecution against a physician for illegally issuing a prescription for liquor, evidence examined and reviewed and *held* that the question of the good faith of the physician in issuing the prescription was properly for the jury. *Ib.*

**JUDGMENTS. See Choses in Action; Equity.****JURISDICTION. See Courts; Justices of the Peace.**

**Manner of Raising Question: Appellate Practice.** An objection to the trial court's jurisdiction over the subject-matter may be raised at any stage of the proceeding, or may be considered by the appellate court *sua sponte*. *Nebel, Admr. v. Bockhorst, Admx. et al.*, 499.

**JURY. See Damages.****JUSTICES OF THE PEACE.**

1. **Justices' Courts: Sufficiency of Statement.** A statement filed in a justice's court, alleging that defendant is indebted to plaintiff for \$125 for medical services rendered by plaintiff to a third person at the special request of defendant, and that the services were reasonably worth \$125, and praying for judgment for that amount and costs, was sufficient, especially after judgment. *Hertel v. Cuba*, 190.
2. **Default Judgments: Appeal: Defective Service: Waiver: Appearance.** Since the taking of an appeal from a judgment by

## JUSTICES OF THE PEACE—Continued.

default from a justice of the peace court does not operate as a waiver of the matter of defective service and confer jurisdiction over the person, the filing on appeal in the circuit court of a motion to dismiss the action would not be an appearance except for the purpose therein stated. *Swezea v. Jenkins et al.*, 428.

3. **Same: Questioning Jurisdiction of Subject-matter, Only.** Where a motion to dismiss in circuit court questioned the jurisdiction of a justice of the peace who rendered the judgment only as to the subject-matter and not as to the person and the subject-matter in question was that over which the justice had jurisdiction, the circuit court properly overruled the motion. *Ib.*
4. **Limited Jurisdiction: Must be Shown.** A justice of the peace has only limited jurisdiction and jurisdiction assumed must be shown somewhere in his proceedings. *Ib.*
5. **Jurisdiction: Promissory Note: Evidence Consulted.** In a suit on a promissory note, to decide whether or not a justice has jurisdiction, not only the face of the proceedings but the entire proceedings, including the evidence, may be consulted. *Ib.*
6. **Same: Record: Evidence Allunde.** On a writ of error to the circuit court, the record proper only was brought up, the jurisdiction of the person being questioned in a case appealed from a justice of the peace. The judgment will not be held void merely because the fact of the proceedings fails to show jurisdiction. Such jurisdiction may be shown by evidence *allunde*. *Ib.*
7. **Jurisdiction: Statutory Provisions.** Plaintiff filed statement and affidavit in replevin before a justice of the peace alleging the value of the property to be \$250 and the damages to be \$50 for their detention. The action was brought in a county having a population of less than 50,000 inhabitants. The justice had no jurisdiction, because under Secs. 7758, 7759, R. S. 1909, in such a county, a justice of the peace in such action has jurisdiction only where the value of the property and the damages are not in excess of \$250. *Stephens v. Reberet*, 456.
8. **Jurisdiction: How Fixed.** In an action of replevin before a justice of the peace the value of the property as set forth in the statement and affidavit which must be filed fixes the jurisdiction of the justice as to the value. [Sections 7759, 7772, R. S. 1909.] *Ib.*
9. **Justices' Courts: Pleading.** No formality in pleading is required in suits instituted in justices' courts, and much liberality is to be indulged respecting the right of recovery under the pleadings. *Marth v. Wiskerchen*, 515.
10. **Same: Suit on Written Instrument.** Where a suit instituted in a justice's court is based upon a written instrument, such instrument must, under Sec. 7412, R. S. 1909, be filed. *Ib.*
11. **Justices' Courts: Sales: Counterclaims.** In an action instituted in a justice's court for the purchase price of a chattel, defendant cannot recover for breach of warranty unless he files a counterclaim therefor prior to the trial before the justice. *Ib.*

**LANDLORD AND TENANT.**

1. **Lease: Implied Covenants.** Unless a lease contains stipulations to the contrary, there is an implied covenant on the part of the lessor, that, when the time comes for the lessee to take possession under the lease, the premises will be open to his entry; but such implied covenant does not impose upon the lessor the obligation to physically put the lessee in possession, and if the premises are open for entry by the lessee at the proper time, and a stranger subsequently interferes with his possession, the implied covenant is not breached and the landlord is not liable therefor. *Brown v. Wall*, 150.
2. **Same: Interference of Third Party: Right of Tenant to Recover Rent Paid.** Plaintiff leased a house from defendant and paid two months' rent in advance, it being agreed that he could take possession at any time he chose. Defendant delivered the key to the premises to him, and thereafter he cleared out the house and moved in some furniture. While the balance of the furniture was being moved in, the police interfered with plaintiff, informing him that he would not be allowed to live in that neighborhood. In an action to recover the rent paid in advance, on the theory that the implied covenant for peaceable possession was breached, *held* that, in view of the fact that the premises were open for occupancy at the time plaintiff's right thereto accrued and that he was prevented from enjoying the occupancy thereof through no fault of defendant, but simply because of the act of a stranger, with whom defendant had no connection, plaintiff was not entitled to recover; the rent paid in advance having been paid pursuant to the lease and not by virtue of plaintiff's occupancy of the premises, and defendant not having breached the lease, was under no obligation to return such advanced payment. *Ib.*
3. **Same: Tenancy at Will: Rent.** Rent becomes due under a common-law tenancy at will only in consequence of occupation. *Ib.*

**LEVEES.**

1. **Organization of Levee District: Collateral Attack Upon.** One who is not a taxpayer in a levee district cannot attack the legality of the organization thereof or its corporate existence in a purely collateral action. *Campbell Lbr. Co. v. Levee Dist.*, 371.
2. **Same: Notice: Collateral Attack.** That notice was not given under Sec. 5728, R. S. 1909, of the landlord's meeting to vote on the doing of the work connected with the establishment of a levee is not ground for collateral attack upon the corporate existence of a levee district organized under Sec. 5714, R. S. 1909. *Ib.*
3. **Organization of Levee District: Public Corporations: For Public Welfare: Courts Reluctant to Interfere With.** Drainage districts are public corporations authorized by law to prevent the overflowing of land. They are organized partly at least under the police power of the State and to promote public welfare and must be given some discretion as to the methods employed to accomplish their work and the courts are loath to interfere with such methods. *Ib.*
4. **Levee Districts: Injunction to Compel Connection.** Plaintiff owned lands which lay in an upper levee district, organized after

**LEVEES—Continued.**

defendant levee district. He was not entitled by injunction to compel defendant district to connect its levee with that of the upper district. *Ib.*

**LIBEL AND SLANDER. See Criminal Law; Indictments and Informations; Instructions.**

1. **Slander Per Se.** A charge that a person is a thief is slanderous *per se*. *Johnson v. Bush*, 107.
2. **Pleading: Petition.** In view of Sec. 1837, R. S. 1909, it is not necessary, in an action for slander, that the petition set out the names of the persons in whose presence the slanderous words were uttered, or that they were understood by those present. *Ib.*
3. **Same.** A petition, in an action for slander, which alleges that, on a certain date named and in a certain city named, defendant spoke certain slanderous words of and concerning plaintiff, is sufficiently definite and certain as to the place where the words were spoken. *Ib.*
4. **Same.** In view of Secs. 1818 and 1837, R. S. 1909, a petition, in an action for slander, which sets out the slanderous words and alleges that they were spoken at a named time and place, cannot be required to be made more definite and certain by setting out the circumstances under which defendant spoke them. *Ib.*
5. **Sustaining Charge: Proving Identical Words Used: Equivalence Not Sufficient.** To substantially sustain the charge of slander and libel there must be substantial proof of the identical words or enough thereof as will support a charge and mere equivalence is not sufficient. *State v. Westbrook*, 421.

**LIFE INSURANCE. See Pleadings and Proof.**

1. **Payment of Less Than Due: Right to Recover Balance.** A payment by an insurer to a beneficiary of a less amount than was due under a life insurance policy, when the beneficiary had not commenced or threatened litigation and had not even made any demand for payment, and the payment was not made by way of compromise, did not deprive the beneficiary of the right to recover the full amount due under the policy. *Dodt v. Prudential Ins. Co.*, 168.
2. **Effect of Misrepresentations: Statute Construed.** The word "misrepresentation" in Sec. 6937, R. S. 1909, which provides that no misrepresentation made in obtaining a life insurance policy shall be deemed material or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event upon which the policy is to become due, includes warranties. *Ib.*
3. **Same.** A life insurance policy which provides that if insured is not in sound health on the date of the policy, insurer's liability is limited to the return of the premiums paid, is governed by Sec. 6937, R. S. 1909, and hence insurer can not defeat a recovery on the ground that insured misrepresented the condition of his health, unless the condition of his health at the time of such alleged misrepresentation contributed to his death. *Ib.*



## LIFE INSURANCE—Continued.

4. **Vexatious Refusal to Pay: Damages.** In an action on a life insurance company, evidence *held* to justify an allowance of damages and attorney's fees, under Sec. 7068, R. S. 1909, for vexatious refusal to pay. *Dodt v. Prudential Ins. Co.*, 168.

## MARRIED WOMEN.

**Marital Rights of Husband in Property: Statutory Provisions.** The statutes of Missouri have gone very far toward depriving the husband of marital rights in his wife's property. [Secs. 8308, 8309, R. S. 1909.] *Wisecup v. Amer. Ins. Co.*, 310.

## MASTER AND SERVANT. See Instructions; Res Adjudicata.

1. **Injury to Servant: Safe Place to Work: Evidence.** In an action for injuries received by a servant by a barrel falling from a stack of barrels upon him, evidence by plaintiff, who had not observed how the barrels were piled, that "the barrels were piled too shaky—that is how it happened," was a statement of a mere conclusion, and hence possessed no probative force toward establishing that the barrels were piled in a negligent manner. *David v. Clarksville Cider Co.*, 13.
2. **Injury to Servant: Safe Place to Work: Sufficiency of Evidence.** In an action for injuries received by a servant by a barrel falling from a stack of barrels upon him, where the petition assigned as negligence that defendant had stacked the barrels in a place where, because of traffic, the ground was caused to vibrate, resulting in the stack becoming insecure and dangerous, and also that the barrels were negligently stacked, evidence *Acid* insufficient to show that the fall was due to the vibration of the ground at the place where the barrels were stacked, or that the barrels were negligently stacked, or if, in fact, they were negligently stacked, that defendant had notice thereof, and hence plaintiff was not entitled to recover. *Ib.*
3. **Same: Fellow-Servants.** Where a cooper employed by a cider company was required, when so directed, to assist in stacking barrels ready for delivery, other servants who stacked the barrels, which subsequently fell on the cooper, were fellow-servants, for whose negligence the master was not liable. *Ib.*
4. **Same: Res Ipsa Loquitur.** The doctrine of *res ipsa loquitur* does not apply, where the injury to a servant was caused by the falling of a barrel from a stack near where he was working. *Ib.*
5. **Injury to Minor Servant: Physical Facts.** In an action for injuries to plaintiff's minor son, while in defendant's employ, caused by a steel wire springing from pliers held by the boy and striking him in the eye, while he was carrying out defendant's order to splice together the two ends of the wire, which had broken, *held* that the testimony given by the boy as to the manner in which he received his injury was not opposed to the physical facts, so as to require that it be rejected. *Warnke v. Leschen etc. Rope Co.*, 30.
6. **Injury to Minor Servant: Failure to Warn: Sufficiency of Evidence.** In an action for injuries to plaintiff's minor son, while employed in winding steel wire on spools, evidence that, after a wire had caught on a defective pulley and broken, defendant's

## MASTER AND SERVANT—Continued.

foreman ordered the boy to get the wire out and splice it, without giving him instructions or warning him of the danger, and that the boy was injured by the wire slipping from his pliers and striking him in the eye, while he was engaged in carrying out the order, *held* sufficient to warrant a finding that the master was negligent. *Ib.*

7. **Same: Instructions.** In an action for injuries to plaintiff's minor son, while in defendant's employ, caused by a steel wire springing from pliers held by the boy and striking him in the eye while he was carrying out defendant's order to splice together the two ends of the wire, which had broken by reason of being caught on a defective pulley, *held* that an instruction given for plaintiff, which submitted the question of defendant's negligence, although unnecessarily long and somewhat lacking in clearness, was not erroneous as being misleading or confusing. *Ib.*
8. **Same: Instructions: Assumption of Facts.** In an action for injuries to plaintiff's minor son, while in defendant's employ, caused by a steel wire springing from pliers held by the boy and striking him in the eye, while he was carrying out defendant's order to splice together the two ends of the wire, which had broken by reason of being caught on a defective pulley, *held* that an instruction given for plaintiff, which submitted the question of defendant's negligence, did not assume that the pulley was defective or that the wire broke, by reason of requiring the jury to "further find from the evidence that in attempting to splice the wire it sank into and caught in said defective pulley," where a former part of the instruction required the jury to find that the pulley was defective and that the wire broke as a result thereof. *Ib.*
9. **Same: Instructions: Conformity to Issues.** In an action for injuries to plaintiff's minor son, while in defendant's employ, caused by a steel wire springing from pliers held by the boy and striking him in the eye, while he was carrying out defendant's order to splice together the two ends of the wire, which had broken by reason of being caught on a defective pulley, the petition alleged, among other things, that the pulley was "badly worn, out of repair, unfit for use, and the wire in question would sink into and catch therein, thereby causing said wire to break; and that it was dangerous to splice said wire because of the difficulty of putting such broken wire over and under said defective, out-of-repair and unfit pulley, in that said wire would sink into and catch in said badly worn, defective and unfit pulley." An instruction given for plaintiff required the jury to find that the pulley was defective and out of repair, and that, on account thereof, the wire became caught in the pulley and sank into it. *Held*, that, while the instruction was not entirely free from criticism, the giving of it did not constitute reversible error on the ground that it was broader than the petition, especially in view of the fact that the gravamen of the charge of negligence was the negligence of the foreman in ordering the boy to splice the wire without giving him instructions or warning him of the danger. *Ib.*
10. **Same: Sufficiency of Evidence.** In an action for injuries to plaintiff's minor son, while in defendant's employ, caused by a steel wire springing from pliers held by the boy and striking him in the eye, while he was carrying out defendant's order to splice together the two ends of the wire, which had broken by

## MASTER AND SERVANT—Continued.

reason of being caught on a defective pulley, evidence *held* sufficient to warrant a finding that it was not reasonably safe for defendant's foreman to order the boy to undertake to splice the wire, under the circumstances, and to warrant a finding that the boy needed instruction in splicing the wire, and that he applied to the foreman for such instruction, but received none. *Warnke v. Leschen, etc. Rope Co.*, 30.

11. **Injury to Servant: Unguarded Machinery: Sufficiency of Evidence.** In an action by a servant for injuries alleged to have been sustained by reason of defendant's negligence in requiring him to work about an unguarded rip-saw, in violation of Sec. 7828, R. S. 1909, *held*, under the evidence, that the question of whether the saw could have been safely and securely guarded, so as to have prevented the injury, was for the jury. *Holt v. Hamilton etc. Co.*, 83.
12. **Injury to Servant: Unguarded Machinery: Contributory Negligence.** In an action by a servant for injuries sustained by reason of his hand coming in contact with an unguarded rip-saw, where it was shown that he detached the power and waited the usual time for the saw to stop and in the dim light thought it had done so, whereupon he reached for a strip beyond the saw, and at that instant the electric light diminished so as to render him unable to see, and, in drawing his hand back, it came in contact with the saw, which was still moving, *held* that the question of whether he was guilty of contributory negligence was for the jury. *Ib.*
13. **Injury to Servant: Safe Place to Work.** It is the duty of a master to furnish sufficient light to enable his servant to see while operating dangerous machinery. *Ib.*
14. **Same: Instructions.** In an action by a servant for injuries sustained by reason of his hand coming in contact with an unguarded rip-saw, where it was shown that he detached the power and waited the usual time for the saw to stop and in the dim light thought it had done so, whereupon he reached for a strip beyond the saw, and at that instant the electric light diminished so as to render him unable to see, and, in drawing his hand back, it came in contact with the saw, which was still moving, *held* that an instruction for plaintiff, which submitted the matter of defendant's omission of care to furnish adequate light, was not erroneous on the ground that it was not supported by the evidence, merely because plaintiff testified that the light was ample for the task of ripping, where he also testified that, after detaching the power and waiting the usual time for the saw to stop, he did not discern that it was moving because of the poor light. *Ib.*
15. **Safe Place to Work: Hazardous Employment.** The duty of the master to furnish his servant a reasonably safe place in which to work does not require him to provide against hazards such as are ordinarily incident to the employment, as where the danger is temporary and arises from the hazard and progress of the work itself; and this rule is particularly applicable to dangers arising out of the demolition of structures. *Cooney v. Laclede etc. Co.*, 156.
16. **Injury to Servant: Safe Place to Work: Sufficiency of Evidence.** In an action for injuries to an employee engaged in

## MASTER AND SERVANT—Continued.

demolishing a platform, caused by his stepping on a plank on the platform, fastened to a joist only by a cleat, which gave way beneath him, *held* that, in view of the fact that the section of the platform where plaintiff was injured was not being demolished at the time and that the plank had not been rendered unsafe by any act connected with the demolition, it was not plaintiff's duty to make a careful inspection of the platform, but he had a right to assume that it was reasonably safe, from the fact that he was ordered to work upon it; *held, further*, in view of these facts, that the duty rested upon the master to see that the platform was reasonably safe, and the evidence disclosing that a slight inspection would have disclosed that the plank was unsafe, the case was one for the jury. *Ib.*

17. **Same: Instructions.** In an action for injuries to an employee engaged in demolishing a platform, caused by his stepping on a plank of the platform, fastened to a joist only by cleat, which gave way beneath him, an instruction that plaintiff could recover if defendant knew, or by ordinary care could have known, of the condition of the plank, and if plaintiff did not know, or by ordinary care could not have known, that the plank was not supported by a cross plank, and was insecurely fastened by cleats, was not vulnerable to the objection that it erroneously allowed a recovery for the failure to inspect a structure that was in the process of demolition, since, at the time plaintiff was injured, he was not tearing down the part of the platform where he was injured, but was using it in the course of his employment, under the assumption that it was reasonably safe. *Ib.*
18. **Same: Instructions.** In an action for injuries to an employee engaged in demolishing a platform, caused by his stepping on a plank of the platform, fastened to a joist only by a cleat, which gave way beneath him, an instruction that plaintiff could recover if defendant knew, or by ordinary care could have known, of the condition of the plank, and if plaintiff did not know, or by ordinary care could not have known, that the plank was not supported by a cross plank, and was insecurely fastened by cleats, was not vulnerable to the objection that it left it to the jury to find that defendant could, and plaintiff could not, by ordinary care, have discovered the insecure plank, when there was no evidence that defendant had any superior opportunity to that of plaintiff for making the discovery, since the duty to inspect the work was on defendant, and not on plaintiff. *Ib.*
19. **Same: Assumption of Risk.** In order to invoke assumption of the risk as a defense, in an action by a servant for personal injuries, it must appear that the risk was incident to the employment and did not arise from the master's negligence and that the servant knew of the danger that caused the injury. *Ib.*
20. **Injuries: Fellow Servant's Negligence: Jury Question.** Evidence in an action for personal injuries received while working in a sawmill examined and it is considered that whether or not the injury to plaintiff was occasioned by negligence of fellow servants is a question for the jury. *Baxter v. Campbell Lbr. Co.*, 352.
21. **Same: Reasonably Safe Place to Work: Jury Question.** In an action for personal injuries, under the evidence, the question is

**MASTER AND SERVANT—Continued.**

considered one for the jury whether or not the place where plaintiff was required to work was a reasonably safe one and whether or not the master had performed his duty in furnishing a reasonably safe place. *Baxter v. Campbell Lbr. Co.*, 352.

22. **Injuries to Servant: Safe Place to Work: Master's Rights.** The master has a right to do his work in his own way, provided it is done with reasonable care and safety. *Ib.*
23. **Temporary Place and Temporary Work: As Bearing On Question of Master's Duty.** That the work which the master gives his servant to do is merely for the time being or that the place is temporary is a circumstance to be considered in determining what is a reasonably safe place to work, but does not generally excuse the master as a matter of law. *Ib.*
24. **Reasonably Safe Place to Work: Installing Blowpipe in Saw-mill.** The rule requiring the master to furnish servant a reasonably safe place to work applied to the work of installing a blowpipe in a sawmill for collecting sawdust and shavings from the saws and planes. *Ib.*
25. **Supervision of Master: Servant's Reliance on Master's Superior Knowledge and Supervision.** Where the servant is working under the surveillance of and in obedience to the direct and peremptory command of the master, quick obedience is required and the servant has a right to rely on the superior knowledge of the master and to obey without careful inspection. He has a right to assume that the master will not send him into a place of danger. *Ib.*
26. **Negligence: Assuming Risks.** A servant does not assume the risks arising from the master's negligence. *Ib.*
27. **Assumption of Risk: Contributory Negligence.** The question of assumed risks and contributory negligence are closely allied and are often treated by the court as being the same. *Ib.*
28. **Delegation of Authority: Liability of Master.** It is the personal duty of the master to direct and control the work, so that, if one servant is given power and authority to direct and control other servants, in the performance of some branch of the master's work, the latter is liable for negligence on the part of such superior servant, in the exercise of the power and authority thus conferred upon him. *Jorkiewicz v. Amer. Brake Co.*, 534.
29. **Injury to Servant: Dual Capacity Doctrine: Vice Principal or Fellow Servant.** An employee, engaged as helper in making crankshafts, by placing a heated billet of metal in a die and causing it to be struck a number of blows by a steam hammer, was injured by a piece of the heated metal, which was sheared off by the die, flying into his eye. A coemployee had immediate supervision over all the men engaged in the work, and he directed the hammer driver and the helpers. The accident happened because the billet was not in a proper position to be struck by the hammer when the coemployee directed the striking of the hammer. In an action for the injuries thus sustained evidence held to justify submission to the jury of the question whether the negligence of the coemployee in causing the billet to be struck when improperly placed was the act of a vice principal, for which the employer was responsible. *Ib.*

**MASTER AND SERVANT—Continued.**

30. **Dual Capacity Doctrine.** The dual capacity doctrine obtains in this State, and it is the character of the act, and not alone the rank of the servant, which determines the question of liability or nonliability of the master for the derelictions of such servant. *Ib.*
31. **Injury to Servant: Safe Place to Work: Assumption of Risk.** Where the superintendent of defendant's stables and a servant whose duties made it necessary that he should go into the stalls, both knew that one of the horses was vicious and would kick, and the servant suggested that such horse should be put into a box stall, but was told by the superintendent that all he had to do was to be careful and he would not be hurt, he did not assume the risk of an injury from the horse kicking him when he approached it with due care, since a servant assumes only such risks as are ordinarily incident to the employment and the injury arose out of the master's negligent failure to exercise ordinary care to furnish the servant a reasonably safe place in which to work. *Moore v. Amer. Express Co.*, 593.
32. **Same: Reliance on Master's Promise.** Where the superintendent of defendant's stables and a servant whose duties made it necessary that he should go into the stalls, both knew that one of the horses was vicious and would kick, and the servant suggested that such horse should be put into a box stall, but was told by the superintendent that all he had to do was to be careful and he would not be hurt, such statement by the superintendent conveyed an assurance of safety to the servant, in the event he was careful; the rule that an experienced servant may not rely on an assurance of safety from an inexperienced master, where the servant knew more of the attendant dangers than the master did, not being applicable, since the superintendent possessed full and complete knowledge pertaining to the vicious propensities of the horse. *Ib.*

**MINES AND MINING.** See **Damages.**

**MISCONDUCT OF COUNSEL.** See **Trial Practice.**

**MONEY HAD AND RECEIVED.**

1. **Overpayment Through Mistake: Evidence.** In an action by one of two stockholders of a corporation, who bought the shares of the other stockholder, to recover an overpayment made to the seller, in arriving at the valuation of the stock, caused by adding to one-half of the value of the merchandise on hand the whole of the outstanding accounts receivable, instead of one-half thereof, *held* that a certified copy of the report of the corporation, made by plaintiff as president prior to the sale and filed in the office of the Secretary of State, had no tendency to show the value placed upon the stock by plaintiff at the time he made it, and hence was inadmissible for that purpose. *Jennemann v. Bucher*, 179.
2. **Pleading: Overpayment Through Mistake: Sufficiency of Petition.** The petition, in an action for money had and received, alleged that defendant, one of the two stockholders of a corporation, entered into a contract with plaintiff, the other stockholder, whereby defendant agreed to sell to plaintiff all of his stock, at and for its book value, which was then and there ascertained and agreed between plaintiff and defendant to amount to the

## MONEY HAD AND RECEIVED—Continued.

sum of \$3361.31, and that, upon the delivery of the stock, plaintiff paid to defendant "through a mistake and error on his part, the sum of \$4334.81 as payment in full for said shares, instead of the said agreed sum of \$3361.31, whereby plaintiff, by reason of said error and mistake, paid to said defendant the sum of \$973.50 in excess of the sum agreed to be paid for said shares of stock," and that plaintiff demanded repayment of such sum as soon as he discovered the error, but defendant refused to refund. *Held*, that the petition, when liberally construed, as it must be after judgment, states a cause of action for money had and received; an averment of a promise to pay being immaterial, as under the facts pleaded, the law implies that promise. *Jennemann v. Bucher*, 179.

3. **Overpayment Through Mistake: Evidence.** In an action by one of two stockholders of a corporation, who bought the shares of the other stockholder, to recover an overpayment made to the seller, in arriving at the valuation of the stock, caused by adding to one-half of the valuation of the merchandise on hand the whole of the outstanding accounts receivable, instead of one-half thereof, where the seller defended on the ground that the transaction was closed, evidence offered by him to the effect that the value of the good will was not figured in the sale, as it should have been, was properly excluded, as being irrelevant to the issues. *Ib.*
4. **Same: Pleading: Walver of Defects: Appellate Practice.** A petition, in an action for money had and received, based on an overpayment through mistake, which alleged that the mistake was made by plaintiff, was not open to objection, after judgment, on the ground that it was insufficient because it did not allege that the mistake was mutual, where the case was tried on the theory that the question of whether there had been a mutual mistake was the controlling issue. *Ib.*
5. **Same: Evidence: Book Value of Corporate Stock.** In an action by one of two stockholders of a corporation, who bought the shares of the other stockholder, to recover an overpayment made to the seller, in arriving at the valuation of the stock, caused by adding to one-half of the value of the merchandise on hand the whole of the outstanding accounts receivable, instead of one-half thereof, *held* that a valuation on the invoice value of the assets would be considered the "book value" of the stock, no other value being given, within an allegation of the petition that the stock was sold at its "book value," although such invoice value was not formally carried on the books of the corporation. *Ib.*
6. **———: Sufficiency of Evidence.** In an action by one of two stockholders of a corporation, who bought the shares of the other stockholder, to recover an overpayment made to the seller, in arriving at the valuation of the stock, caused by adding to one-half of the value of the merchandise on hand the whole of the outstanding accounts receivable, instead of one-half thereof, evidence *held* to sustain a finding that plaintiff had overpaid defendant as a result of a mutual mistake, warranting a judgment in his favor. *Ib.*

**MORTGAGES AND DEEDS OF TRUST.** See **Conveyances; Insurance.**

**Credits to be Given: What Included.** A beneficiary under a deed of trust purchased a special tax bill against the property, paid the taxes and insurance. The buildings burned and he collected insurance thereon. He was bound to credit his bid at the foreclosure sale under the deed on the costs of the sale and on payments made by him and if there was any balance it should have been credited on the note. He should have also credited on the note a sufficient amount of the insurance collected to have paid said note in full and the balance should have been paid to the grantor. *Rutherford Admx. v. Sample*, 469.

**MUNICIPAL CORPORATIONS.** See **Prohibition.**

1. **Acts of Officers: When Unauthorized: City Not Liable.** The street commissioner of a city of the fourth class constructed a drain whereby surface water was collected and thrown onto plaintiff's lot, thereby damaging plaintiff. No ordinance had been passed by the city giving authority for the construction of said drain. The city cannot be held liable for the damages, though it paid for the work under a general appropriation ordinance. *Jones v. City of Caruthersville*, 404.
2. **Cities of Fourth Class: Surface Drainage: Improvements: Necessity of Ordinance.** Cities of the fourth class can legally make surface drainage improvements only by an ordinance. [Sec. 9400, R. S. 1909.] *Ib.*
3. **Proceedings for Incorporation: Validity of Petition: "Taxable Inhabitants."** Under Sec. 8529, R. S. 1909, providing that, whenever a majority of the "inhabitants" of any unincorporated city or town shall present a petition to the county court, setting forth the metes and bounds of their city or town and commons, and praying that they may be incorporated and a police established for their local government and for the preservation and regulation of any commons pertaining to such city or town, if the court shall be satisfied that a majority of the "taxable inhabitants" of such town have signed such petition, it shall declare such city or town incorporated, a petition signed by a majority of the *taxable* inhabitants is sufficient. *State ex rel. v. Buerman*, 691.
4. **Same: Failure to Describe Commons.** A petition for the incorporation of a city, under Sec. 8529, R. S. 1909, was not fatally defective because of the failure to describe any commons and to pray for the incorporation of the city for the preservation and regulation of such commons, where it expressly alleged that there were no commons. *Ib.*
5. **Same: Including Farm Lands.** While county courts have no right to incorporate farming or agricultural lands, as such, into cities or towns, yet lands used for agricultural purposes solely may become so surrounded and connected with lands used for town and city purposes as to constitute a part thereof, and in such case they may be included with the corporate limits. *Ib.*



**NEGLIGENCE.** See **Carriers of Goods; Carriers of Passengers; Master and Servant; Railroads; Street Railways.**

1. **Contributory Negligence: Question for Jury.** Contributory negligence is for the jury, where the question is one about which reasonable minds may differ. *Holt v. Hamilton, etc. Shoe Co.*, 83.
2. **"Ordinary Care."** "Ordinary care" is such care as an ordinarily prudent person would be expected to exercise in the circumstances of the case. *Ib.*
3. **Emergency Acts.** The question of whether a person exercised ordinary care is to be considered with reference to the particular circumstances that obtained, and if some change of condition was suddenly thrust upon him, tending to disconcert his senses for the moment, such fact should be considered along with the others, and, in this view, an act which might ordinarily be regarded as negligent as a matter of law would be mitigated or excused, in a measure, so as to make it a question for the jury, if it was occasioned by sudden shock or surprise. *Ib.*
4. **Instructions: Submitting Immaterial Facts.** In a negligent action an instruction which correctly submits a theory of negligence justified by the evidence is not to be condemned because it requires a finding of additional facts that are not essential to a recovery. *Ib.*
5. **Driving Team: Duty of Driver.** A driver of a team, who was delivering goods to a freight platform, about which there were many persons, was guilty of negligence in backing his wagon with great force against the platform, without looking to see that no one was about or giving warning that he was going to back. *Lauff v. Kennard, etc. Carpet Co.*, 123.
6. **Same: Injury to Pedestrian: Physical Facts: "Second."** In an action for injuries sustained by being struck by a backing wagon at a freight platform, evidence by plaintiff that, after seeing defendant's wagon being driven forward, he entered a space between two wagons, to mount the platform, and, a second later, was struck by defendant's wagon, which was backed into the space, was not subject to condemnation as being improbable nor as contrary to the physical facts because of the use of the word "second," since that term was used to express a short interval of time, and not in its precise sense. *Ib.*
7. **Same: Contributory Negligence.** In an action for injuries sustained by being struck by a backing wagon at a freight platform, plaintiff testified that, after seeing defendant's wagon being driven forward, he entered a space between two wagons, to mount the platform, and, a second later, was struck by defendant's wagon, which was backed into the space. *Held*, that it does not conclusively appear from this evidence that plaintiff tarried in the face of a known danger, and hence the question of whether he was guilty of contributory negligence was for the jury. *Ib.*
8. **Pleading: Instructions: Necessity of Submitting Specific Negligence.** Where, in an action for personal injuries, the petition contains specific assignments, as well as a general charge, of negligence, a recovery can be had under the specific assignments only; and even though the petition contains a general charge only, the instructions submitting the question of negli-

## NEGLIGENCE—Continued.

gence must require a finding of the particular acts of negligence revealed by the evidence. *Ib.*

9. **Same.** Where, in an action for personal injuries, the petition charged that defendant's servant, who backed a wagon against him, was negligent in failing to look out for or warn plaintiff, an instruction authorizing a verdict for plaintiff in that defendant's servant did not exercise ordinary care was erroneous, for the reason that it did not confine the recovery to the negligence specified. *Ib.*
10. **Driving Team: Injury to Pedestrian: Grounds of Recovery.** The fact that a delivery wagon which backed against and injured plaintiff at a freight platform could have been driven to another place to deliver the goods it carried, furnished no ground of recovery, in an action for the injuries thus sustained. *Ib.*
11. **Law of Place of Tort.** In a transitory common law action for negligence the law of the place where the tort was committed governs. *Coy v. St. L., etc., R. R. Co.*, 408.
12. **Last Chance Doctrine: Rationale.** The last chance doctrine proceeds upon the theory that the negligence of the person injured, in creating the situation of peril, was remote in the chain of causation, and the omission of the defendant to thereafter prevent injury to such person was the proximate cause of the injury, where it appears that the situation of peril was discovered or was discoverable by the defendant by exercising the requisite degree of care, in time to have enabled him to avert the injury. *Whitesides, Admr. v. C. B. & Q. R. R. Co.*, 608.
13. **How Established: Evidence.** Negligence is a positive wrong which must be established by facts and circumstances, including inferences, but cannot be presumed. *Ib.*
14. **Railroads: Death: Boarding Trains.** The plaintiff, widow of Frederick Iba, deceased, sued to recover damages from the defendant for the death of her husband. The deceased attempted to board a train for which he had purchased a ticket. He succeeded in placing one foot on the lowest step of the car and had a hold of the hand railing, when the conductor pulled on him, and he hit against a freight truck standing close, lost his hold, fell under the car, and was killed. *Held*, that there was no reversible error in the record and the judgment for \$5000 will be affirmed. *Iba v. C. B. & Q. R. R. Co. et al.*, 718.
15. **Same.** Where one starts to board a train, for which he has purchased a ticket, and before it is signalled to start, he is acting within the scope of his rights as invitee, and the conductor has no right to eject him, especially after the train starts. When such ejection is the proximate cause of his death or injury, the conductor is liable to respond in damages and also the railroad company because of its responsibility for his act under the rule of *respondent superior*. *Ib.*
17. **Pleading: Specific Negligence.** Where the petition in a negligence case contains both a general and a specific charge of negligence, the former is entirely superseded by the latter. *May et al. v. City of Hannibal*, 602.
18. **Same: Res Ipsa Loquitur: Effect of Pleading Specific Negligence: Instructions.** Where the petition in a negligence case

### NEGLIGENCE—Continued.

contains a general averment of negligence, under which the doctrine of *res ipsa loquitur* would apply, and also allege specific acts of negligence, such specific allegations render the doctrine of *res ipsa loquitur* inapplicable, and the instructions must require a finding on the specific acts alleged. *May et al., v. City of Hannibal*, 602.

19. **Same.** In an action for the death of a lineman, caused by his coming in contact with a wire charged with electricity maintained by defendant, the petition, after alleging negligence generally, also alleged that the insulation on the wire was worn and rotten. The court charged the jury, at the instance of plaintiff, that if decedent was killed as a direct result of a shock from such wire, that fact was conclusive proof of defective insulation, unless the jury found that the insulation was as safe as it could be reasonably made, that the utmost care had been used to keep it so insulated, and that, while the insulation was in a safe condition, the climbing spur strapped to decedent's foot came in contact with the insulation and punctured it, through no fault of defendant and through no defect in the insulation. *Held*, that the instruction was erroneous, for the reason that it failed to submit the specific acts of negligence pleaded, and because it invoked a presumption of negligence, as though the doctrine of *res ipsa loquitur* were applicable, when the doctrine could not be availed of because specific negligence was pleaded. *Ib.*

**NEGOTIABLE INSTRUMENTS.** See *Bills and Notes*.

**NEW TRIAL.** See *Appellate Practice*.

1. **Effect on Counts Dismissed: Ipso Facto Reinstatement.** The trial court compelled plaintiff to elect on which of two counts in his petition he would proceed. The jury returned a verdict for defendant on the count on which plaintiff elected to stand, and plaintiff took an involuntary nonsuit as to the other count. Subsequently the court sustained plaintiff's motion for a new trial and set aside the verdict, on the ground that it erred in compelling the election. On a subsequent trial, without the count as to which a nonsuit had been taken being formally reinstated, a verdict was rendered for defendant on both counts. *Held*, that the action of the court on granting a new trial *ipso facto* reinstated said count, and hence the court had jurisdiction to try the issues presented by it notwithstanding it was not formally reinstated by an order of record. *Wonderly v. Haynes*, 75.
2. **Findings on Several Counts: Issues Retriable.** An order sustaining a motion for a new trial ordinarily leaves the case as though no trial had taken place, except when the petition contains two or more counts and the verdict is for plaintiff on one or more and for defendant on one or more, in which case the granting of a new trial to one of the parties on a count under which the finding was against him does not of itself reopen other counts well tried and decided in his favor. *Ib.*
3. **Scope: Issues Retriable.** An order granting a new trial, unless otherwise limited, will be presumed to award a new trial on all of the issues and to reopen the whole case. *Ib.*
4. **Newly Discovered Evidence: Relevancy.** Newly discovered evidence is not a ground for a new trial unless it relates to the issues that were tried. *Jennemann v. Bucher*, 179.
5. **Appellate Practice: Action on Special Taxbills: Sufficiency of Motion for New Trial.** A motion for a new trial on the ground

## NEW TRIAL—Continued.

that the court, in rendering judgment on special taxbills, erred in allowing interest thereon from the date of their issue, and that the verdict and finding were excessive, preserved to the party complaining the right to question the finding as to interest. *Coatsworth Lbr. Co. v. Owen et al.*, 543.

## PARTIES TO SUIT.

1. **Misjoinder: Walver.** Where plaintiff elected to sue the executor of her father's will for her share of the proceeds of land sold by the executor, who was not a distributee, and the distributees were made parties defendant and they and the executor set up an offset for the reasonable value of the land while it was occupied by plaintiff before the sale, plaintiff was in no position to thereafter object to the administrator as a party defendant. *Oliver v. Epperson et al.*, 622.

## PARENT AND CHILD. See Divorce.

**Child Abandonment: Elements of Offense: Sufficiency of Evidence.** Under Sec. 4495, R. S. 1909, as amended by Laws 1911, p. 193, declaring it to be an offense, if a man, without good cause, abandons his child, under the age of fifteen, and fails, neglects or refuses to provide for it, there must be a concurrence of abandonment without good cause, with criminal intent, and of failure to furnish it necessities; and hence, where the mother, having the custody of children, refused the father's offer to provide a home and care for them, and they were provided for by their grandparents, the father was not guilty of the offense denounced by this statute. *State v. Tietz*, 672.

## PAYMENT. See Pleadings and Proof.

## PERSONAL INJURIES. See Damages.

## PERSONAL PROPERTY. See Animals.

## PHYSICIANS AND SURGEONS. See Instructions; Intoxicating Liquors.

1. **Services Rendered Third Person: Sufficiency of Evidence.** In an action by a physician for medical services rendered defendant's adult son, evidence *held* sufficient to sustain a finding that the services were rendered under an express promise by defendant, made before their rendition, that he would pay plaintiff for them and hence it is *held* that the case was one for the jury. *Hertel v. Cuba*, 190.
2. **Same: Evidence.** In an action by a physician for medical services rendered a third person at the request of defendant, a statement filed with an insurance company by the third person, in which, after setting out that he had sustained the injuries for which plaintiff treated him, he stated that he thought he was entitled to his lost wages and doctor's bills, and that such bills amounted to \$150 was inadmissible against plaintiff, as also was evidence that the third party had been paid by the insurance company for doctor's bills. *Ib.*
3. **Same: Instructions.** In an action by a physician for medical services rendered a third person at the request of defendant

## PHYSICIANS AND SURGEONS—Continued.

and under a promise by him, made before the services were rendered, that he would pay plaintiff therefor, *held* that an instruction given for plaintiff, submitting his theory to the jury, was free from error. *Hertel v. Cuba*, 190.

4. **Skill and Care Required.** It is not sufficient that a physician or surgeon possess ordinary skill and that he use proper and approved methods and appliances in treating patients generally but in treating any particular case he must in that case use proper methods and put in practice his reasonable skill and diligence. *Fowler v. Burris*, 347.

**PLEADING.** See *Appellate Practice: Choses in Action; Damages; Elections; Equity; Justices of the Peace; Libel and Slander; Money Had and Received; Negligence.*

1. **Pleading Evidence.** In view of Sec. 1818, R. S. 1909, it is error to require a petition to be made more definite and certain by setting out matters of evidence. *Johnson v. Bush*, 107.
2. **Construction of Petition After Judgment.** A petition must be liberally construed after judgment, so as to support the judgment. *Jennemann v. Bucher*, 179.
3. **Failure of Consideration: Issue to be Tendered by Answer.** Where the issue of failure of consideration is not tendered by the answer, such failure cannot be shown. (Sec. 1974, R. S. 1909.) *Woodin v. Leach*, 275.
4. **Variance: Statutory Provisions: Affidavit of Surprise.** Action on a note due in thirty days, executed by the corporation defendant and another, payable to the corporation and indorsed by it to plaintiff. The petition declared upon a note due in ninety days, executed by the corporation and defendant to themselves and indorsed to plaintiff. The variance *held* immaterial, in view of Secs. 1846, 1847, R. S. 1909, in the absence of an affidavit of surprise. *First Natl. Bank v. Stam*, 439.
5. **Amended Petition: New Cause of Action: Bills and Notes.** Action on a promissory note. Plaintiff filed an amended petition so that the allegations would conform to the note. Such amended petition was not subject to a motion to strike as it did not change the cause of action. *Ib.*
6. **Petition: Construction After Verdict.** After verdict, the petition is to be more liberally viewed, to the end of making out a cause of action, if such may be done, by fair inference and reasonable intendment. *McGowan v. Gardner et al.*, 484.
7. **Pleading: Fatally Defective Petition: Waiver of Defects.** A failure of a petition to state facts that are essential to the statement of a cause of action is a matter going to the jurisdiction and necessarily fatal, and hence the defendant is not precluded from complaining of such defect, on appeal, by reason of having tried the case as though the petition were sufficient. *Ib.*

## PLEADINGS AND PROOF.

1. **Variance: How Taken Advantage of.** A variance between the petition and evidence which is received without objection can

## PLEADINGS AND PROOF—Continued.

only be taken advantage of by defendant by an affidavit of surprise as contemplated by Sec. 1846, R. S. 1909, if defendant was not prepared to meet the issue. *Tanner v. St. L. etc. Ry. Co.*, 264.

2. **Payment: Burden of Proof.** The burden of proving payment is on him who asserts the same or seeks to avail himself of its benefits and the rule applies to a defendant, although plaintiff has alleged nonpayment met by a denial. *Adkinson et al. v. McKay*, 391.
3. **Insurance: Review of Pleadings.** Action by beneficiary on beneficiary certificate of insurance. Pleadings reviewed. *Gilmore v. Modern Brotherhood of Amer.*, 445.
4. **Judgment in Equity Need not Follow Pleadings Absolutely.** Though the relief granted may be somewhat different from the specific relief sought, it may be given plaintiff if the petition justifies and plaintiff is entitled to same. *Rutherford, Admx.*, v. Sample, 469.

## PLEDGE.

1. **Principal and Surety: Duty of Pledgee: Discharge of Surety.** It is the duty of a person holding collateral security to carefully and faithfully perform all acts necessary to make the collateral available, and if he failed to perform this duty, as a result of which the collateral is lost, a surety for the debt is discharged, to the extent that he is thereby injured. *Troll, Admr. v. Daugherty, etc. Co.*, 196.
2. **Same: Discharge of Surety.** Where a surety for a debt consents, either expressly or impliedly, to release a part of the collateral security, he is not discharged by reason of such release being made. *Ib.*
3. **Foreclosure: Defenses: Sufficiency of Evidence.** In an action to recover the balance due on promissory notes which were secured by the pledge of collateral, and to foreclose the equity of redemption in such collateral, defended on the theory that plaintiff had released other collateral which also had been pledged for much less than its value, without defendants' consent, evidence held to justify a finding that defendants gave their consent to the release of the collateral. *Ib.*

**PRACTICE, APPELLATE.** See Appellate Practice.

**PRACTICE, TRIAL.** See Trial Practice.

**PRINCIPAL AND AGENT.** See Evidence; Fraud: Fraudulent Representations.

1. **Services Performed for Political Committee: Authority of Agent.** Where the chairman of the State committee of a political party retained an attorney to act in impending election contest proceedings, without authority from the committee, and the attorney employed plaintiff to render services in the contest, the individual members of the committee were not liable for plaintiff's services. *Owen v. Hadley et al.*, 1.
2. **Same.** Where the chairman of the State committee of a political party, without authority from the committee or the con-

## PRINCIPAL AND AGENT—Continued.

testees, retained an attorney to act in impending election contest proceedings, and the attorney employed plaintiff to render certain services in connection with such contest, without undertaking to bind any one else, limiting his own responsibility to a certain amount per week, such contract bound no one but the attorney who made it. *Owen v. Hadley et al.*, 1.

3. **False Representations of Agent: When Principal Liable: Sale of Land.** When the owner of land pays a broker or agent a commission to sell same and in effecting the sale, the agent makes representations which are false concerning the land and one is induced thereby to purchase, such owner, though not aware of the fraud, upon accepting the benefits of the transaction must also assume the burdens thereof and the fraud of the agent is chargeable to the owner, provided the representations complained of are such as would naturally fall within the apparent scope of the agent's employment. *Connecticut, etc. Ins. Co. v. Carson*, 221.
4. **Authority of Agent: Sufficiency of Evidence.** In an action for the purchase price of a chattel, defended on the theory that defendant had rescinded the sale because of a breach of warranty and had delivered the chattel to plaintiff's agent and directed him to notify plaintiff of the rescission, evidence held insufficient to prove that such person was plaintiff's agent. *Marth v. Wiskerchen*, 515.

PRINCIPAL AND SURETY. See **Pledges**.

PROMISSORY NOTES. See **Bills and Notes**.

## PROHIBITION.

1. **Habeas Corpus: Orders Subsequent to Final Judgment: Jurisdiction.** Prohibition lies to restrain the circuit court from making orders with respect to the custody of a child, in a *habeas corpus* proceeding, where a final judgment has previously been entered in the proceeding. *State ex rel. v. Rassleur*, 214.
2. **Municipal Corporations: Proceedings for Incorporation: Prohibition Against County Court.** That agricultural lands were included within the boundaries of a proposed city, where this did not appear on the face of the petition for incorporation filed in the county court, that the petition was not signed by the requisite number of taxable inhabitants, that the county court was about to proceed to have testimony taken out of court, in the absence of the parties and in an irregular manner, for the purpose of determining whether the parties whose names appeared on the petition had in fact signed it, or that a fraud was about to be perpetrated, would not justify prohibition to prevent action by the county court, as prohibition lies only when there is a lack of jurisdiction or where there are acts in excess of jurisdiction, and all of these matters were within the jurisdiction of the county court and to be determined by it in the first instance, though the judgment, when made might be void and open to attack by *quo warranto*. *State ex rel. v. Buerman et al.*, 691.
3. **Same.** That the proposed incorporation of a city might lead to further litigation, or to unsettled conditions, though regrettable, afforded no legal ground for restraining the incorpora-

## PROHIBITION—Continued.

tion by prohibition, especially as to halt threatened litigation is the office of the writ of injunction, and not of prohibition. *Ib.*

## QUO WARRANTO.

**RAILROADS.** See Appeal and Error: Carriers of Goods; Carriers of Live Stock; Carriers of Passengers; Evidence; Negligence.

1. **Death from Crossing Collision: Damages.** Action against a railroad company by a widow for damages on account of the death of her husband resulting from injuries received from being struck by defendant's train at street crossing. Evidence reviewed. *Tanner v. St. L., etc. Ry. Co.*, 264.
2. **Crossing Collisions: Death from Injuries: Presumptions.** In an action against a railroad company for damages for the death of plaintiff's husband as a result of being struck by defendant's train at a railroad crossing, absent any evidence to the contrary, it will be presumed that the deceased in crossing over the railroad was exercising proper care and that he looked and listened where it was his duty to do so. *Ib.*
3. **Same: Demurrer to Evidence.** In an action for damages against a railroad company for the death of her husband, killed while crossing a railroad track at a street crossing, *held* that under the evidence a demurrer to the testimony was not warranted. *Ib.*
4. **Statutory Signals: Persons Entitled to Invoke..** Certain considerations indicate that a person walking along a railroad track is not, if injured, by being struck by a train, entitled to invoke the failure to sound the bell or blow the whistle on the locomotive eighty rods from a road crossing, conformably to Sec. 3140, R. S. 1909, as a ground of recovery, but that such failure inures only in favor of persons using the crossing in connection with the use of the highway. *Whitesides v. C. B. & Q. R. R. Co.*, 608.
5. **Same: Contributory Negligence.** Sec. 3140, R. S. 1909, enjoining the duty of sounding the bell or blowing the whistle on a locomotive eighty rods from a road crossing, supplies the causal connection between a failure to perform such duty and an injury to a person at the crossing; but contributory negligence on the part of the person injured will defeat a recovery. *Ib.*
6. **Injury of Pedestrian: Failure to Give Statutory Signals: Contributory Negligence.** In an action for the death of a person walking along a railroad track, after dark, caused by his being struck by a train at a road crossing, where it was shown that decedent, a young man, possessed of all his faculties, knew that the train was due to pass the point of the accident about the time the accident occurred, and that the train made such noise that a person who was six hundred feet away heard it, and that decedent could have seen the train when it was half a mile away, *held* that decedent was guilty of contributory negligence as a matter of law, barring a recovery for his death on the theory that the statutory signals were not given, as required by Sec. 3140, R. S. 1909. *Ib.*
7. **Injury to Pedestrian: Last Chance Doctrine.** In order that a recovery may be had, under the last chance doctrine, for the



**RAILROADS—Continued.**

death of a pedestrian by being struck by a train at a railroad crossing, it must be shown that decedent was on the track or in a position of peril when struck, and that the engineer could have seen him there, by the exercise of ordinary care, at such a distance as to have enabled him to avert the injury by prompt action with the means at hand for that purpose, with safety to persons on the train. *Whitesides v. C. B. & Q. R. R. Co.*, 608.

8. **Injury to Pedestrian: Evidence: Inferences.** The facts that a blood spot was found on the railroad track at a highway crossing, that the skull of the deceased person was crushed, his shoulder "caved in" and his hip injured, were sufficient to warrant an inference that he was struck by a train; and the fact that the body was found to the north of the blood spot warranted an inference that such train was northbound, and decedent having been seen walking along the track a short while before a certain northbound train passed, an inference that such train caused his death was legitimate. *Ib.*
9. **Same: Last Chance Doctrine: Sufficiency of Evidence.** In an action for the death of a person walking along a railroad track after dark, caused by his being struck by a train, evidence held insufficient to justify a finding that decedent was in a position of peril for a sufficient length of time to have enabled the engineer, by the exercise of due care, to discover him and prevent the accident by the use of the instrumentalities at hand for that purpose; the inferences relied upon by plaintiff to establish such facts resting, not upon facts, but upon other inferences, which is not allowable. *Ib.*

**REAL ESTATE. See Husband and Wife; Vendor and Vendee.**

1. **Sales: Vendor and Purchaser: Fraud: Rescission: Statement of Facts.** Facts stated in an action to recover certain land in which a counterclaim to set aside a contract of sale because of fraud and to recover payments made thereon. *Connecticut. etc., Ins. Co. v. Carson*, 221.
2. **Contracts for Sale: Implied Covenants.** The law implies that one selling land shall furnish a good title, and a "good title" means a "marketable title." *Wiemann v. Steffen*, 584.
3. **Same: Marketable Title: Title Under Statute of Limitations.** If a contract for the sale of land specifically provides for a title of a particular kind and character, as a title shown of record, or by means of an abstract, a title so evidenced must be given; but if the contract is to furnish a good and marketable title, free from defects, it is complied with by tendering a good title by adverse possession under the Statute of Limitations. *Ib.*
4. **Same: "Marketable Title."** An agreement, in a contract for the sale of land, to furnish a marketable title, free from defects, contains no implied covenant that the title will be such as the purchaser will be willing to accept or such as his attorney may pronounce good and marketable; a "marketable title" being one which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing and ought to accept. *Ib.*

## REAL ESTATE BROKER.

1. **Right to Commission.** A real estate broker who procures a purchaser ready, willing and able to buy on the owner's terms is entitled to the agreed commission, although the sale was not completed because of a defect in the title, and especially is this so where the brokerage contract required the owner to furnish an abstract showing good title. *Maddux v. St. Louis, etc. Trust Co.*, 138.
2. **Same: Representing Adverse Interest.** A broker who represents an adverse interest without the consent of his principal forfeits his commission. *Ib.*
3. **Same.** The doctrine that a real estate broker forfeits his commission if he represents an adverse interest, without the consent of his principal, is based on fraud, and such conduct, therefore, may not be presumed, but must be found from facts constituting substantial evidence on the issue. *Ib.*
4. **Right to Commission: Representing Adverse Interest: Sufficiency of Evidence.** In an action by a real estate broker for a commission for finding a purchaser for real estate, defended on the theory that the broker had forfeited his commission by reason of the fact that he had represented the buyer without the consent of defendant, evidence *held* insufficient to warrant the submission of the defense to the jury. *Ib.*
5. **Employment: Sufficiency of Evidence.** In an action by a real estate broker for a commission for having procured an exchange of land, evidence *held* to show that defendant engaged plaintiff to find some one with whom he might make a trade or deal to dispose of his land. *Jennings et al. v. Overholt*, 505.
6. **Right to Commission: Special Contract.** Under a special contract requiring a real estate broker to dispose of property upon certain terms, the owner may, in good faith, insist upon the exact price or the fulfillment of other terms of the contract, and refuse to sell to the broker's customer on modified terms, and if the broker, after full opportunity, fails to perform, the owner, as a new deal, may sell the property to the broker's customer on more favorable terms, without incurring liability for a commission; but if the owner deals with the broker's customer at a lower price or upon other terms, while the agency continues and the broker is working with the customer on the contract terms, the owner will be liable for a commission. *Ib.*
7. **Same: Exchange of Land.** A real estate broker, authorized generally to effect an exchange of land, but not to fix the terms, who put defendant in communication with a landowner with whom defendant made an exchange, was entitled to a commission, notwithstanding the trade effected differed from the one suggested by the broker to his customer. *Ib.*

## RESCISSION. See Sales; Vendor and Vendee.

1. **Fraud: Necessity of Prompt Action.** The right to disaffirm or rescind a contract on the ground of fraud must be exercised immediately on the discovery of the fraud, and the disaffirmance must be *in toto*. "Immediately" does not mean *instantly*, regardless of hindering conditions, but means a reasonable time, considering the conditions, not to deliberate on whether

## RESCISSION—Continued.

to rescind, but to do the things necessary in order to rescind. *Rigler v. Reid et al.*, 111.

2. **Same.** In an action on a promissory note, defendant on the theory that the note was given for the purchase price of corporate stock which defendant was induced to purchase from plaintiff through the latter's fraudulent misrepresentations, where it was shown that defendant purchased the stock on May 16th and was immediately elected secretary of the corporation, that he discovered the alleged fraud on June 1st, and thereafter continued to act in connection with the corporation's business and sought to sell the stock to other parties, and did not seek to have the sale rescinded or offer to return the stock to plaintiff until July 29th, *held* that defendant did not attempt to rescind the contract on discovery of the fraud and hence his right to rescind was lost. *Ib.*

## RECORDING INSTRUMENTS. See Conveyances.

## RES ADJUDICATA. See Drainage District.

1. **Issues Concluded: Action on Same Demand: Action on Different Demand.** There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties, upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action, concluding the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. *LaRue v. Kempf*, 57.
2. **Rationale of Doctrine.** The doctrine of *res adjudicata* proceeds upon the theory, on the one hand, that it is to the interest of the State that there should be an end to litigation, and, on the other hand, that the individual should not be twice vexed for the same cause. *Ib.*
3. **Matters Determined: Parol Evidence.** Where the record, in a former action, does not show what questions were determined therein, that fact may be shown by extrinsic parol evidence. *Ib.*
4. **Issues Concluded: Facts Stated.** In an action by a divorced wife, who had been awarded the custody of the minor children, to recover from her former husband for their maintenance for ten years, defended on the ground that he was released from liability by an agreement entered into in connection with the divorce proceedings, under which he had paid her a sum of money in satisfaction of his liability for their maintenance, and on the ground that, in a former suit by plaintiff to recover for their maintenance for a period of thirteen months, in which defendant pleaded the same agreement as a release, judgment was entered for defendant, *held* that the briefs filed by the attorneys in the former action established that

## RES ADJUDICATA—Continued.

the question of the effect of the agreement in the divorce case was submitted in such action and determined in defendant's favor, and hence plaintiff was estopped, as a matter of law, from maintaining the present action, under the principle that a judgment in a former action is conclusive as to all questions that were actually in issue and adjudicated therein, notwithstanding the cause of action in the subsequent suit is not the identical cause of action as that involved in the former. *Ib.*

5. **Persons Concluded: Master and Servant.** Where the subject of the litigation does not concern the employment or relation of master and servant, there is no privity between the master and the servant, and hence a judgment in favor of the master is not available to the servant as the basis of a plea of *res adjudicata*, in an action subsequently brought against him. *Mayger v. Nichols*, 102.
6. **Same.** A judgment in favor of a corporation, in an action for the conversion by its secretary of shares of its capital stock, the certificates of which were sent to him to be transferred, was not a bar, under the doctrine of *res adjudicata*, to the maintenance of an action for the conversion against the secretary as an individual. *Ib.*

## SALES.

1. **Delivery to Carrier.** Where goods are sold f. o. b. cars at point of shipment, a delivery to the carrier selected by the vendee to receive them is a delivery to the agent of the vendee. *Corby Supply Co. v. Thompson*, 95.
2. **Same: Bill of Lading.** A bill of lading represents the goods for which it is given, and its delivery passes the title as effectually as would an actual delivery of the goods. *Ib.*
3. **Same.** Where goods, which had been sold f. o. b. cars at point of shipment, were delivered to the carrier selected by the vendee, after the time for making the shipment had expired, an acceptance of the bill of lading for the goods by the vendee, with full knowledge of the delay, operated as an acceptance of the goods, then in the possession of the carrier as his agent, and prevented his rescinding the sale on account of the delay. *Ib.*
4. **Delay in Delivery: Remedies of Vendee.** Where time of performance is made an essential element of a contract of sale, it is regarded as being in the nature of a warranty that the goods will be delivered within the time stipulated, and in case of failure to so deliver, the vendee has the option, either to rescind the contract and refuse to accept the goods, or to receive them and recover from the vendor the damages sustained on account of the delay. *Ib.*
5. **Fraud and Deceit: Rescission.** One who is defrauded in making a purchase has an election to either affirm or rescind the transaction, but an election to affirm will thereafter prevent a rescission. *Rigler v. Reid et al.*, 111.
6. **Fraud: Not Established, When.** Fraud is not established by merely proving that certain timber of the value of \$250 was sold for \$800. *Woodin v. Leach*, 275.

**SALES—Continued.**

7. **Contracts: Acceptance.** An instrument which directed an advertising company to ship to the signer designated advertising material, for a specified compensation, was merely an order, and was not enforceable, in the absence of an acceptance by the company, since, without such acceptance, it lacked mutuality. *Outcault, etc. Co. v. Wilson*, 492.
8. **Same: Orders: Acceptance.** Where an order for merchandise, signed by one party, is not countermanded, and the other party acts thereon and fully performs, such performance becomes a valid consideration, and relates back to the date of the order, which becomes an enforceable contract. *Ib.*
9. **Same: Revocation.** Where one who signed an order for merchandise notified the seller, before the latter had accepted the order, not to fill it, he was thereafter under no legal duty to accept the goods and pay the price specified in the order, since the order was revocable at any time before it became a contract through being accepted and acted upon by the seller, and the fact that the buyer placed his refusal to accept the goods upon the ground that the seller had first breached the contract was immaterial. *Ib.*
10. **Rescission: Necessity of Prompt Action: Sufficiency of Evidence.** In an action for the purchase price of a chattel, defendant set up, by way of defense, that he had rescinded the sale because of a breach of warranty and had delivered the chattel to plaintiff's agent and directed him to notify plaintiff of the rescission. The evidence was insufficient to establish that such person was plaintiff's agent, but did show that plaintiff himself could have been reached by defendant with notice of the rescission during the day on which the alleged rescission was made and the day following. Plaintiff did not receive notice of the alleged rescission for about two months. *Held*, that the defense was untenable, for the reason that defendant did not promptly notify plaintiff of the rescission or tender back the chattel. *Marth v. Wiskerchen*, 515.
11. **Rescission: Necessity of Prompt Action.** A buyer who desires to rescind a contract of sale on the ground that the thing sold does not comply with the terms thereof must, immediately upon discovering such fact, disaffirm, notify the seller of such disaffirmance, and tender back the thing sold; but "immediately" does not mean *instantly*, but means a reasonable time, under the circumstances. *Ib.*

**SPECIAL TAX BILLS.**

1. **Improvement of Streets: Validity of Proceedings.** A resolution passed by the council of a city of the third class, declaring it necessary to pave a street with first-class vitrified paving bricks or blocks, and to curb the same with first-class concrete curbing, according to plans, diagrams and specifications on file with the city clerk, filed by the city engineer, complies with the requirements of Sections 9254 and 9255, R. S. 1909. *Coatsworth Lbr. Co. v. Owen et al.*, 543.
2. **Same.** An estimate of the cost of paving and curbing a street in a city of the third class, filed by the city engineer, which gives the estimated cost of paving the street, stating separately the estimated cost per square yard of the foundation, sand

## SPECIAL TAX BILLS—Continued.

cushions, fillers, and brick surface, and estimates the cost of curbing at a specified sum per lineal foot, and estimates the total number of square yards of paving and lineal feet of curbing and the total cost, complies with the requirements of Sec. 9254, R. S. 1909. Ib.

3. **Same: Time for Completion of Work.** An ordinance for a street improvement and the contract for the work provided that the work should be completed on or before a designated date, "unless delayed by bad weather and the council grant an extension of time on that account." The work was substantially completed before the designated date, but there were defects in it, due to the fact that the temperature at times fell below freezing point while the work was being done. After the expiration of the time limit, an ordinance was passed extending the time of completion of the work on account of bad weather. As soon thereafter as the work could be safely done, the defects were remedied under the direction of the city engineer. *Held*, that the special taxbills issued for the cost of the work were not void on the ground that the work was not completed within the time limit. Ib.
4. **Cancellation: Quieting Title.** Where a special taxbill for a street improvement is absolutely void for defects apparent on its face and on the face of the tax proceedings, equity will not cancel the bill as a cloud on the title to the land against which it is issued; but the rule is otherwise where the bill appears to be valid on its face and the invalidity asserted is one requiring extrinsic evidence to establish it. Ib.
5. **Commencement of Lien.** The time of the commencement of the lien of a special taxbill is determined by the statute creating the right to issue the bill. Ib.
6. **Irregularities: Amendment of Bill.** The irregularity in an original special taxbill for a street improvement because issued against three lots jointly may be corrected by the issuance of amended taxbills against each lot, but the lien arises at the date of the issuance of the original bill. Ib.
7. **Same: Proper Officer to Sign.** Amended special taxbills, issued in lieu of an original bill, which was irregular, are properly signed by the person who, as mayor, signed the original bill, notwithstanding his term of office had expired. Ib.
8. **Performance of Work: Substantial Compliance.** A reasonable and substantial compliance, in good faith, with the ordinance and contract for a street improvement is all that the law requires. Ib.
9. **Same: Sufficiency of Evidence.** In an action to cancel a special taxbill for the cost of improving a street in a city of the third class, evidence *held* to justify a finding that the contractor had reasonably and substantially complied, in good faith, with the ordinance and contract provisions. Ib.
10. **Same.** Although a proceeding to enforce a special taxbill issued for the cost of street improvements is *in invitum*, and the law, jealously safeguarding the substantial rights of the citizen, does not permit his property to be burdened with a lien for such improvements unless the contractor has, in good

**SPECIAL TAX BILLS—Continued.**

faith, fairly and substantially complied with the terms and conditions of his undertaking, according to the true spirit and intent thereof, nevertheless, it is not the policy of the courts to demand a highly technical, literal compliance with the contract stipulations, without regard to the obvious intent and purpose thereof, for such would tend to defeat the very objects of the law authorizing municipalities to provide and contract for the making of improvements of this character. *Coatsworth Lbr. Co. v. Owen et al.*, 543.

11. **Action to Quiet Title: Counterclaims.** Where suit is brought to cancel a special taxbill, defendant may enforce the lien thereof by way of counterclaim, under Sec. 1087, R. S. 1909, as being a cause of action arising out of the transaction forming the foundation of plaintiff's claim or connected with the subject of the action. *Ib.*
12. **Interest.** Where neither the ordinance authorizing a street improvement nor that levying the assessment and providing for the issuance of special taxbills for the cost of the improvement provided for interest, interest was not allowable on the taxbills, although, under Sec. 9254, R. S. 1909, the city could have provided that the bills bear interest at the rate of eight per cent per annum, to begin thirty days after issue. *Ib.*

**STATUTE OF FRAUDS.**

1. **Agreements Not Within Statute.** An agreement under which plaintiff delivered money to defendant, to be invested in a deed of trust, was not one required to be in writing by the Statute of Frauds, since it constituted a mere agreement as to what disposition defendant was to make of plaintiff's money, acting as his agent. *Martin v. Printz*, 52.
2. **Sale of Goods: Acceptance and Delivery: Sufficiency of Evidence.** Plaintiff made up the material for office fixtures for defendant, in accordance with a parol contract. Defendant inspected the material so prepared at plaintiff's factory, stating that it was satisfactory, and asking when it would be installed. Subsequently, the material was taken to defendant's place of business and part of it was installed, but, before the work was finished, defendant objected to certain things, and refused to allow plaintiff to go on. In an action for the value of such material, *held* that, although the value of such material was in excess of \$30, nevertheless the case was not within the Statute of Frauds (Sec. 2784, R. S. 1909), since the evidence was sufficient to show an acceptance of all of the material by defendant and a delivery of at least part of it. *Hollrah et c. Co. v. St. L. et c. Co.*, 207.
3. **Sale of Goods: Acceptance and Delivery.** In a sale of goods of the value of \$30 or upwards, an acceptance of all, and delivery of only a part, of the goods satisfies the Statute of Frauds (Sec. 2784, R. S. 1909). *Ib.*
4. **Same.** In a sale of goods of the value of \$30 or upwards, acceptance and delivery need not, in order to satisfy the Statute of Frauds (Sec. 2784, R. S. 1909), be contemporaneous, and acceptance may precede delivery, although, to take the case out of the statute, delivery must be made in accordance with the contract. *Ib.*

## STATUTES CITED AND CONSTRUED.

## Session Acts

Laws of 1867, p. 112, see page 685.  
 Laws of 1873, p. 53, see page 218.  
 Laws of 1891, p. 174, see page 459.  
 Laws of 1891, p. 175, see page 459.  
 Laws of 1905, p. 180, see pages 564, 565.  
 Laws of 1905, p. 183, see pages 564, 565.  
 Laws of 1905, p. 185, see pages 564, 565.  
 Laws of 1905, p. 186, see pages 564, 565.  
 Laws of 1909, p. 450, see page 685.  
 Laws of 1911, p. 193, see page 674.  
 Laws of 1911, p. 284, see pages 450, 452.  
 Laws of 1911, p. 290, see pages 450, 452.  
 Laws of 1911, p. 301, see pages 450, 452.

## Revised Statutes 1879

Section 1273, see page 686.  
 2881, see page 459.  
 2895, see page 459.

## Revised Statutes 1909

Section 154, see page 503.	5578, see page 273.
160, see page 503.	5581, see page 377.
856, see page 473.	5599, see page 273.
1807, see page 234.	5602, see page 274.
1818, see page 110.	5635, see page 273.
1837, see page 109.	5714, see page 374.
1844, see page 443.	5716, see page 374.
1846, see pages 270, 443.	5728, see page 377.
1847, see page 413.	5763, see page 374.
1850, see page 52.	5784, see page 367.
1855, see page 286.	5800, see page 489.
1856, see page 286.	6937, see page 176.
1974, see page 281.	6973, see page 176.
2048, see page 718.	7020, see page 176.
2082, see page 52.	7395, see page 460.
2259, see page 233.	7399, see page 432.
2260, see page 233.	7412, see page 522.
2261, see page 233.	7656, see page 644.
2510, see page 220.	7758, see page 458.
2784, see page 213.	7759, see page 460.
3320, see page 285.	7772, see page 458.
3330, see pages 283, 636.	7828, see page 89.
4495, see pages 674, 683.	7883, see page 643.
5425, see pages 271, 721.	8129, see page 693.
5426, see page 721.	8308, see page 316.
5427, see page 721.	8309, see page 316.

STATUTES, CONSTRUCTION OF. See Life Insurance.

## STREET RAILWAYS.

1. Injury to Pedestrian: Violation of Vigilant Watch Ordinance: Sufficiency of Evidence. In an action for injuries to a person struck by a street car while walking near the track, evidence that plaintiff was in plain view of the motorman as the car approached and that the car could have been stopped within two feet, held to warrant the submission of the case to the jury on the question as to whether the motorman failed to keep a  
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**STREET RAILWAYS—Continued.**

"vigilant watch," as required by a municipal ordinance, or, if he kept such watch, whether he was negligent in failing to stop the car, or, at least, sound the gong. *Martin v. United Rys. Co.*, 576.

2. **Same: Vigilant Watch Ordinance: Last Chance Doctrine: Pleading.** In an action for injuries to a person struck by a street car, where the petition counted on the violation of the Vigilant Ordinance of the city of St. Louis, enjoining upon motormen the duty to keep a vigilant watch for persons on or approaching the track, and to stop the car in the shortest time and space possible, upon the first appearance of danger to such person, an instruction authorizing a recovery under the last chance doctrine was not erroneous, on the ground that such doctrine was not pleaded, since such ordinance is merely declaratory of the last chance doctrine; the two being identical in their practical import and application. *Ib.*
3. **Same: Instructions: Use of Streets.** In an action for injuries to a person struck by a street car while walking near the track, an instruction, that defendant was not entitled to the exclusive use of the street, and that it was the duty of defendant, in using said street, to operate its cars thereon with the same care and vigilance that would be exercised by a person of ordinary care and prudence, and that, in the exercise of such care, it was the duty of the motorman operating the car which struck plaintiff to be on the watch for persons on the tracks of defendant or approaching said tracks, was not erroneous, on the theory that it misled the jury into believing that plaintiff had a right on the track, or adjacent thereto, equal to defendant, since notwithstanding a street railway company's right to use that part of the street occupied by its tracks is paramount to the right of pedestrians thereon, nevertheless pedestrians have the unquestioned right to walk upon the track, subject, however, to the duty to leave it, when necessary to do so, for the movement of cars, and the instruction merely refers in general terms to the use of the street and accurately states the law concerning that matter, together with the attendant duty resting upon defendant in using it. *Ib.*
4. **Injury to Intended Passenger at Station: Degree of Care.** One who was struck and killed by an interurban car while crossing the track from a station on one side thereof to a platform on the other side, for the purpose of boarding the car, even if not a passenger, was an invitee whose presence the operators of the car were bound to anticipate and for whose safety they were required to exercise special care, and it was negligence for them to run the car past the station at a high rate of speed, without taking any precautions for the safety of such person. *Melerhoff v. United Rys. Co.*, 567.
5. **Same: Contributory Negligence.** One who was struck and killed by an interurban car while crossing the track from a station on one side thereof to a platform on the other side, for the purpose of boarding the car, was not required to exercise the same care for his own safety as is required of a trespasser or even of a pedestrian at a highway crossing, since he had the right to assume that the operators of the car would take special precautions for his safety, and hence the question of whether he was guilty of contributory negligence was for the jury. *Ib.*

**TAX BILLS.** See *Special Tax Bills*.

**TELEGRAPH AND TELEPHONES.**

1. **Neglect in Transmitting Messages: Statutory Provisions Concerning.** Legislation imposing a penalty on telegraph and telephone companies for neglect to promptly transmit messages traced through different statutory provisions and revisions. (R. S. 1865, pp. 349, 350, R. S. 1879, sections 883, 885; R. S. 1889, secs. 2725, 1827; R. S. 1899, secs. 1255, 1257; Laws 1907, pp. 188, 189; R. S. 1909, secs. 3330, 3332.) *Robertson v. Western Union, etc. Co.*, 281.
2. **Delay in Transmitting Messages: Defenses.** A telegraph company, sued under the provisions of sec. 3330, R. S. 1909, for delay in transmitting a message, may defend under sec. 3332, R. S. 1909, because its wires were out of order; but to avail itself of such defense it must also show that plaintiff was notified of said fact as required by Sec. 3332, R. S. 1909. *Ib.*
3. **Failure to Deliver Message: Penalty: Necessity of Prepayment.** Payment or tender of the usual charges for transmitting and delivering a telegram, at the time it is accepted, is a condition precedent to the right to recover the penalty provided for by Sec. 3330, R. S. 1909, for failure of the telegraph company to promptly transmit and deliver the telegram. *Moran v. Western Union, etc. Co.*, 633.

**TORTS.**

**Result of Negligence: Result of Fraud: No Distinction.** There is no reasonable distinction between a tort brought on through fraud and one brought on through negligence. *Connecticut, etc. Ins. Co. v. Carson*, 221.

**TRESPASS.** See *Animals*.

1. **Forcible Entry into Room: Remedy of Tenant.** An action, by one who had been in peaceable possession of a room rented to him by the tenant of the house, against an agent of the owner, for breaking into his room and removing his property therefrom, is an ordinary action for trespass, and hence the point made by defendant, that plaintiff's sole remedy was by an action for forcible entry and detainer in a justice's court, under Sec. 7656, R. S. 1909, was untenable. *Strauel v. Lubeley*, 638.
2. **Same: Punitive Damages.** Where an agent of the owner of a house, after unsuccessfully attempting to get a constable to do so, entered a room occupied by plaintiff, who had rented it from a former tenant of the entire house and was in peaceable possession of it, and removed plaintiff's property therefrom, it was proper to authorize the jury to assess punitive damages against him, if they found that he acted wantonly and maliciously. *Ib.*

**TRIAL PRACTICE.** See *Appellate Practice*.

1. **Statements of Counsel: When not Cause for Reversal.** In an action for breach of a contract of sale of corn, certain statements in argument of counsel examined and considered not cause for reversal. *Horne et al. v. Franklin*, 434.
2. **Conflicting Evidence: Questions for Jury.** The question is for the jury when the evidence with respect to it is conflicting. *Martin v. United Rys. Co.*, 576.

**VARIANCE.** See Bills and Notes; Pleading.

**VENDOR AND VENDEE.** See Real Estate, Sales.

1. **Ejectment: Set-off and Counterclaim.** Where it is sought to eject a defendant who went into possession under the title of plaintiff and who for some reason should be ejected, the defendant may, if he have an equitable counterclaim against the plaintiff, interpose and try it in the ejectment suit. On the other hand, where defendant went into possession through a stranger to the plaintiff, he must recover the value of the improvements made, which in equity he should have, by an independent action. *Connecticut, etc. Ins. Co. v. Carson*, 221.
2. **Sale of Land: Action to Recover Possession: Set-off and Counterclaim.** Where a vendor of land seeks to recover same, the purchaser may set up, under Sec. 1807, R. S. 1909, as an equitable counterclaim, a right to rescind for fraud and to recover payments made. *Ib.*
3. **Sale of Land: Fraud: Rescission: Delay: Laches.** Purchaser of certain lands delayed a year and four months to rescind the contract because of fraud. Vendor's position was not changed by the delay. Conditions and circumstances considered and the delay held not sufficient to bar the right to rescind. *Ib.*
4. **Real Estate: Contract of Sale: Fraud of Vendor's Agent: Rescission by Purchaser.** Action in ejectment. Defendant asked to have his contract of purchase of certain real estate because of alleged fraud on the part of the plaintiff's agent and prayed for damages. A judgment awarding damages to defendant is reversed with directions to enter judgment for plaintiff. (*FARRINGTON, J., Dissenting.*) *Connecticut, etc. Ins. Co. v. Guseman*, 236.

**VERDICTS.** See Appeal and Error; Damages.

1. **Directing: When Trial Court Should Direct Verdict.** It is as much the duty of the trial court to direct a verdict for the defendant where the undisputed facts show no liability to have been incurred as it is to submit the case to the jury where the evidence is conflicting. *Gilmore v. Modern Brotherhood of Amer.*, 445.
2. **Binding Effect of.** The finding of a jury on controverted facts is binding on the appellate court. *Bledsoe v. West et al.*, 460.
3. **Responsiveness to Issues: Amount of Recovery.** Where plaintiff pleads a contract for an agreed commission for the sale of land, and defendant denies that he entered into the contract or that he is liable for the commission, a verdict for plaintiff for one-half the alleged contract price is outside of the issues and cannot stand. *Menefee v. Diggs*, 659.
4. **Inconsistent Finding: Verdict on Claim and Counterclaim.** Where suit was brought on a contract for the stipulated price of doing certain work in accordance with its provisions and defendant denied that plaintiff was entitled to recover anything and filed a counterclaim for failure to do the work according to the requirements of the contract and within the time therein provided, a verdict in favor of plaintiff on its claim, and in favor of defendant on its counterclaim for an amount greater than the contract price for doing the work, is so in-

**VERDICTS—Continued.**

consistent that it cannot be permitted to stand, since a verdict for plaintiff must necessarily be founded upon at least substantial compliance with the contract by it, while, on the other hand, defendant's right of recovery on the counterclaim depends upon a finding that plaintiff failed to substantially perform the contract. *Ferd Bauer E. & C. Co. v. Arctic Ice, etc. Co.*, 664.

**WAGES.**

**WAIVER.** See *Equity; Instructions; Insurance; Parties to Suit; Pleading.*

**WARRANTY.**

1. **Breach: Performance in Part: Defenses.** Grantor in a warranty deed covenanted to pay such part of a debt as would release from a deed of trust the lands conveyed. In an action by grantees for breach of this covenant, the fact that the deed of trust also covered other lands and that defendant had paid all of his proportionate part of the debt except a part tendered to plaintiffs, was not a good defense. *Adkinson et al. v. McKay*, 391.
2. **Breach of Covenant: Establishment: Evidence.** Action for breach of covenant in warranty deed to remove incumbrance from land conveyed. It was not necessary to establish plaintiff's right to recover that they should introduce in evidence the secured note by them, its absence being accounted for and the amount, date and rate of interest not being in dispute. *Ib.*
3. **Breach of Covenants: Unavailing Defense.** In an action for breach of covenant in warranty deed to remove an incumbrance from land conveyed, where plaintiffs (grantees) had been forced to pay the note secured by deed of trust covering the land conveyed and the land of another, that the holder of the note, on receiving payment, released all the land will not avail as a defense. *Ib.*

**WARRANTY DEEDS.** See *Warranty.*

**WITNESSES.** See *Evidence.*

**Impeachment: Competency of Witness.** The testimony of a witness that he knew the reputation of another witness for truth and veracity, and that it was not good, should not be stricken out merely because, on cross-examination, he is unable to give anything like a correct definition of the term "reputation for truth and veracity;" this merely affecting the weight of his testimony, which is a question for the jury to determine. *Siegel v. Ill. Central R. R. Co.*, 645.

# Rules Governing Practice in the Kansas City Court of Appeals.

*It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:*

**RULE 1.—Presiding Judge.** The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

**RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.**

**RULE 3.—Hearing of Causes.** No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

**RULE 4.—Taking Records from Clerk's Office.** Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

**RULE 5.—Diminution of Records.** No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

**RULE 6.—Certiorari to Perfect Record.** Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

**RULE 7.—Notices of Writs of Error.** All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

**RULE 8.—Review of Instructions on General Statement of Evidence.** In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

**RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court.** If the opposite party shall

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contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

**RULE 10.—Evidence—Bill of Exceptions to be Allowed.** When. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

**RULE 11.—Exceptions—Questions to be Embodied in Bill.** When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

**RULE 12.—Duty of Circuit Court Clerks in Making Transcripts.** The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the ——— day of ———, 188—, executed on the ——— day of ———, 188—;*" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

**RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence.** The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

**RULE 14.—Bill of Exceptions in Equity Cases.** In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

**RULE 15.—Abstract and Briefs to be Filed and Served.** In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions

## KANSAS CITY COURT OF APPEALS.

presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same: and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

**RULE 16.—Citing Authorities in Briefs.** In compliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side-paging shall be set forth. The respondent, in his statement, may adopt that of appellant; or, if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

**RULE 17.—Appellant's Brief to Allege Errors Complained of.** The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

**RULE 18.—Penalty for Failure to Comply with Rule 15.** If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

## KANSAS CITY COURT OF APPEALS.

**RULE 19.—Agreed Statement of the Cause of Action.** Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

**RULE 20.—Motion for Rehearing.** Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

**RULE 21.—Motion for Affirmance.** On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

**RULE 22.—Extending Time for Filing Statement, Abstracts, Etc.** In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

**RULE 23.—Oral Arguments.** When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him, and will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will thereupon make his statement and answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and in such cases the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

**RULE 24.—Notice on Motion to Dismiss or Affirm.** A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by writ ten notice, and shall, on filing such motion, satisfy the Court that such notice has been given.



## KANSAS CITY COURT OF APPEALS.

**RULE 25.—When Appeal is Returnable—Certificate of Judgment—Transcript.** In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable: and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

**RULE 26.—Record Entries Perfecting Appeal not to Be Abstracted.** Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then, absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter, no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be true, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

(Adopted, January 6, 1913.)

**RULE 27.** The defacement of books in the library by marking the margin of pages, or by drawing lines underneath printed matter, or by turning down the corners of leaves, is prohibited.

**RULE 28.** An abstract of the record is a court paper not for the exclusive benefit of either party; therefore, in printing such abstract the parties are forbidden to italicize any part of it, except where the record from which the abstract is taken is in italics. If italics are desired, they may be used in the statement, brief and written argument.

**RULE 29.** Where an original instruction is modified by the trial court, it is not necessary to print them separately in the abstract. The instruction, as modified, should be printed with the words of modification printed in italics, or between brackets, that the court may readily observe the point of difference.

**RULE 30.** Where there are several exhibits in the cause, they should be identified in the index to the abstract more definitely than by a mere number, or letter.

# Rules of Practice in the St. Louis Court of Appeals.

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REVISED JULY 20, 1909.

TO BE IN FORCE AUGUST 15, 1909.

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**Rule 1.—Presiding Judge.** The Presiding Judge shall superintend all matters of order in the Court Room.

**Rule 2.—Words Appellant and Respondent, What They Include.** Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

**Rule 3.—Motions.** All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

**Rule 4.—Hearing of Causes.** Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

**Rule 5.—Diminution of Record.** No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

**Rule 6.—Certiorari to Perfect Record.** Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

## ST. LOUIS COURT OF APPEALS.

**Rule 7.—Notice of Writs of Error.** All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

**Rule 8.—Reviewing Instructions.** For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

**Rule 9.—Bills of Exceptions in Equity Cases.** In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

**Rule 10.—Duty of the Clerk in Making Up Transcripts.** The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the \_\_\_\_\_ day of \_\_\_\_\_ 190—, executed on the \_\_\_\_\_ day of \_\_\_\_\_, 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

**Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence.** The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

**Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served.** In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstract above referred to and of any

## ST. LOUIS COURT OF APPEALS.

objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

**Rule 13.—Printed Transcripts.** A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

**Rule 14.—Abstracts—When Filed and Served.** In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

**Rule 15.—Abstracts, What They Shall Contain.** Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

**Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript.** In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2048, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for

## ST. LOUIS COURT OF APPEALS.

the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

**Rule 17.—Costs, When Allowed for Printing Abstracts and Records.** Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

**Rule 18.—Briefs, What to Contain and When Served.** The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

**Rule 19.—Citing Authorities in Brief.** In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

## ST. LOUIS COURT OF APPEALS.

Authorities incorrectly cited as to book, page or title of case, will be disregarded.

**Rule 20.—Extension of Time.** Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

**Rule 21.—Penalty for Failure to Comply With Rules 12, 14, 15, 16 and 18.** If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

**Rule 22.—Agreed Statement of Cause of Action.** Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

**Rule 23.—Motions for Rehearing.** Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk. No motion to certify any case to the Supreme Court will be entertained nor shall any such motion be filed by the clerk. See *Barnett et al. v. Colonial Hotel B. Co.*, 119 S. W. 471; 177 Mo. App. 477.

Rule 24 is hereby amended to read as follows:

**Rule 24.—Oral Arguments.** When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, and if he has not consumed all of his time in opening. The whole time consumed by either party in statement and argument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided* further, that in appeals in causes originating before a Justice of the Peace, the time for argument shall not exceed thirty (30) minutes on each side.

(x)

## ST. LOUIS COURT OF APPEALS.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court in *extenso* the written or printed argument on file, nor from reports or text books.

The above rule to be in force and effect on and after June 6, 1910.

**Rule 25.—Notice on Motion to Dismiss or Affirm.** A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

**Rule 26.—Motion for Affirmance.** On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

**Rule 27.—Appearance of Counsel.** The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

**Rule 28.—Allowance to Garnishees.** Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

**Rule 29.—Service of Abstracts and Briefs in Criminal Cases.** The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attor-

## ST. LOUIS COURT OF APPEALS.

ney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

**Rule 30.—Return of Original Writs.** Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

**Rule 31.—Withdrawing Records.** No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

**Rule 32.—Repeal of Former Rules.** All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

**Rule. 33.—**In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.

**Rule 34.** An appellant having filed a certified copy of the order granting an appeal,

(a) Need not abstract the record entries showing the steps taken in the trial court to perfect such appeal. If the abstract



ST. LOUIS COURT OF APPEALS.

states that the appeal was duly taken, then, absent a certified transcript of the record showing to the contrary, it will be presumed that the proper steps were taken at the proper time and term.

(b) No appellant or plaintiff in error need abstract record entries evidencing his leave to file or various extensions of time granted for filing, a bill of exceptions, but it will be sufficient if his abstract states that the bill of exceptions was duly filed.

The burden, in either of the above paragraphs a or b, will then be upon the respondent or, in writs of error, upon defendant in error, to produce in this court a transcript of the record, or of as much thereof as is necessary, duly certified by the clerk of the trial court, showing the contrary to be the fact, if he make the point.

(c) When the respondent or defendant in error desires to challenge the abstract of the record for any of the above defects, he shall give notice in writing to the opposite counsel, which notice shall be served upon such counsel within ten days after the abstract has been served, failing which, no such objection will be entertained. Such notice, shall, at least five days after service thereof, be filed with the clerk of this court, together with certified transcript of record above required.

[Adopted December 14, 1912.]

# RULES OF PRACTICE

## IN THE

### SPRINGFIELD COURT OF APPEALS.

Adopted August 19, 1909.

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**RULE 1.—Presiding Judge.** The Presiding Judge shall superintend all matters of order in the court room.

**RULE 2.—Words Appellant and Respondent, what they include.** Whenever the word appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

**RULE 3.—Motions.** All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

**RULE 4.—Hearing of Causes.** Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

**RULE 5.—Diminution of Record.** No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

**RULE 6.—Certiorari to Perfect Record.** Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

**RULE 7.—Notice of Writs of Error.** All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

**RULE 8.—Reviewing Instructions.** For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove.

## SPRINGFIELD COURT OF APPEALS.

then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

**RULE 9.—Bills of Exceptions in Equity Cases.** In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

**RULE 10.—Duty of the Clerk in Making up Transcripts.** The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 190—, executed on the — day of — 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

**RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence.** The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

**RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served.** In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

**RULE 13.—Printed Transcripts.** A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule, and dispense with the necessity of any further transcript.

**RULE 14.—Abstracts, when Filed and Served.** In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty

## SPRINGFIELD COURT OF APPEALS.

days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

**RULE 15.—Abstracts, What They Shall Contain.** Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the question and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Provided: In all cases wherein there are statements or other evidence in the printed abstracts of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal, and any statement that the bill of exceptions was signed, sealed or made a part of the record will be taken to be a statement that said bill of exceptions was signed, sealed and filed and made a part of the record at the proper time and in the proper manner, such abstracts shall be deemed sufficient as to any of the aforesaid matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be a sufficient objection to state that the abstract does not show such steps were taken in proper time or in a proper manner, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time or in proper manner, as the case may be, and thereupon, the Court shall determine the matter and the costs thereof shall be taxed as the Court shall deem just. (Amended January 3, 1911, to take effect February 1, 1911.)

**RULE 16.—When Appeal is Returnable; Certificate of Judgment; Transcript.** In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2048, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

**RULE 17.—Costs, when Allowed for Printing Abstracts and Records.** Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 2048, Revised Statutes 1909, which fails to make a full presentation of all the record nec-

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essary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

**RULE 18.—Briefs, what to Contain and when Served.** The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

**RULE 19.—Citing Authorities in Briefs.** In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

**RULE 20.—Continuing and Resetting Cases.** No case shall be reset or continued, or time extended for filing statements, abstracts or briefs, on mere agreement of counsel, but only for sufficient cause shown, and by order of the court. (Effective December 1st. 1910.)

**RULE 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18.** If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard

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from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

**RULE 22.—Agreed Statement or Cause of Action.** Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

**RULE 23.—Motions for Rehearing.** Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

**RULE 24.—Oral Arguments.** When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant in error replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

**RULE 25.—Notice on Motion to Dismiss or Affirm.** A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the court will require satisfactory proof that proper notice has been given.

**RULE 26.—Motion for Affirmance.** On motion for affirmance under section 2047, Revised Statutes 1909, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

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**RULE 27.—Appearance of Counsel.** The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

**RULE 28.—Allowance to Garnishees.**—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

**RULE 29.—Service of Abstracts and Briefs in Criminal Cases.** The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney, shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

**RULE 30.—Return of Original Writs.** Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

**RULE 31.—Withdrawing Records.** No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

**RULE 32.—Record Entries Perfecting Appeal not to be Abstracted.** Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

Adopted March 3, 1913.













